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REPORTS
OF
CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI

Between November 17 and December 31, 1914.

PERRY S. RADER,
REPORTER.

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JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

HON. HENRY LAMM, Chief Justice.
HON. ARCHELAUS M. WOODSON, Judge.
HON. WALLER W. GRAVES, Judge.
HON. JOHN C. BROWN, Judge.
HON. HENRY W. BOND, Judge.
HON. ROBERT FRANKLIN WALKER, Judge.
HON. CHARLES B. FARIS, Judge.

JOHN T. BARKER, Attorney-General.
J. D. ALLEN, Clerk.
JOSEPH H. FINKS, Marshal.

JUDGES OF THE SUPREME COURT

BY DIVISIONS

DIVISION ONE.

HON. ARCHELAUS M. WOODSON, Presiding Judge.

HON. HENRY LAMM, Judge.

HON. WALLER W. GRAVES, Judge.

HON. HENRY W. BOND, Judge.

HON. JAMES T. BLAIR, Commissioner.

HON. STEPHEN S. BROWN, Commissioner.

DIVISION TWO.

HON. ROBERT FRANKLIN WALKER, Presiding Judge.

HON. JOHN C. BROWN, Judge.

HON. CHARLES B. FARIS, Judge.

HON. FRED L. WILLIAMS, Commissioner.

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CASES DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MISSOURI
AT THE
OCTOBER TERM, 1914

(Continued from Volume 261.)

GIANNOULA DIARIOTTI v. MISSOURI PACIFIC
RAILWAY COMPANY, Appellant.

In Banc, November 17, 1914.

1. **NEGLIGENCE: Recovery for Death: Law of Kansas: Liberally Construed.** Section 4871, General Statutes of Kansas 1901, providing for a recovery by the personal representatives for a wrongful killing, if the person killed might have maintained an action had he lived, is coeval with the State of Kansas, is remedial in character, and should receive a liberal interpretation.
2. ———: ———: ———: ———: **Notice.** Section 4871, General Statutes of Kansas 1901, provides that when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action had he lived. Section 1, chap. 393, Laws of Kansas 1903, provides that a railroad operating in that State shall be liable to any employee for all damages done to him through the negligence of its agents, engineers or other employees, provided that notice in writing of the injury shall have been given "by or on behalf of the person injured" within 90 days after the accident. *Held*, that the words concerning notice in Sec. 1, chap. 393, do not apply to an action under

Sec. 4871, because notice can be given neither by the dead nor in their behalf, and the provision does not include notice given in behalf of one entitled to damages for the death of another. [WOODSON, J., dissents.]

3. ———: ———: ———: **Suit by Widow of Allen.** Under the laws of Kansas (Sec. 4872, G. S. 1901), an alien next of kin can maintain an action for damages for the wrongful killing of another alien, and where a widow, resident in Greece, filed her suit in Missouri, where her husband died as a result of injuries received in Kansas, an allegation in her petition that her husband died in Missouri is sufficient to show her capacity to sue until defendant shall plead and prove that deceased left an estate to be administered in Kansas.
4. ———: ———: ———: **Question for Jury: Evidence: Reports to Defendant introduced by Plaintiff.** Evidence in an action by a widow for damages for the death of her husband through the negligent managing of hand cars by defendant's employees *held* to justify a submission of the case to the jury despite the fact that, to show notice, plaintiff introduced reports of employees, made to the company in compliance with its rules, which tended to show due care on defendant's part and contributory negligence on that of deceased.

Appeal from Jackson Circuit Court.—*Hon. H. L. McCune*, Judge.

AFFIRMED AND REMANDED.

Martin L. Clardy and *Edw. J. White* for appellant; *Elijah Robinson* of counsel.

(1) The court erred in setting aside the verdict and judgment in this case in favor of the defendant and granting the plaintiff a new trial. The statute of Kansas, not vesting the cause of action absolutely in the widow, but the right to sue passing to the administrator or personal representatives of the deceased, the widow could not maintain the action, as the probate court, alone, would have jurisdiction to determine her property right and its jurisdiction in this regard was both original and exclusive. (2) The plaintiff's own evidence established that the accident through

Diariotti v. Railroad.

which Diariotti was injured, was not caused by any negligence of the defendant, or any of its employees, but that the deceased himself was guilty of negligence, directly contributing to his injury. The plaintiff put in evidence the statements of Bill Curissi and Pietro Darass and Bill Danasa. These statements showed that the deceased was "standing on hand car, when he become overbalanced and fell in front of the car. . . . Injured man says, got out of balance. No one to blame." And some of the witnesses for the plaintiff testified that the fourth car ran against the third car and knocked several men off, the deceased being one of them, but their testimony was conflicting and unsatisfactory and was diametrically opposed to the statements introduced by the plaintiff and standing alone was insufficient to support a verdict for the plaintiff. *Moore v. Railroad*, 28 Mo. 622; *Peck v. Railroad*, 31 Mo. App. 123; *Peffer v. Railroad*, 98 Mo. App. 291; *Railroad Co. v. Shertle*, 92 Pa. St. 450. Both Peter Darass and Bill Corizis, in their statements, state that the deceased was told three or four times to hold on to the lever, which would have prevented his falling, but he failed to do so. This was a part of plaintiff's evidence and was uncontradicted. These statements convicted the deceased of contributory negligence, as a matter of law, and since he could not have recovered for the injury resulting therefrom, the plaintiff was also not entitled to recover and the demurrer was properly sustained. *Van Bach v. Railroad*, 171 Mo. 338; *Tanner v. Railroad*, 161 Mo. 497; *Huggard v. Railroad*, 134 Mo. 497; *Kelsey v. Railroad*, 129 Mo. 362. (3) If the death of the deceased could be connected at all with the defendant's negligence, it was the negligence of its "agents" and "employees" and under the statute of Kansas, in force at the time of his injury and death, it was a condition precedent to the plaintiff's right to maintain this action; that "notice in writing of the injury, stating the time and place thereof," should have

been given the railroad company," within ninety days after the occurrence of the accident and the failure to give this notice was a complete barrier to the plaintiff's right to maintain this cause of action. Mathieson v. Railroad, 219 Mo. 542.

Conkling, Rea & Sparrow for respondent.

BROWN, C.—The plaintiff is the widow of Peter K. Diariotti who was killed while engaged in the service of the defendant near Hope station in the State of Kansas, July 6, 1904. She commenced this suit in the circuit court for Jackson county, Missouri, at Kansas City, September 19, 1905, to recover damages sustained by reason of his death.

In her amended petition the plaintiff alleged that her husband was one of a number of laborers in defendant's employ working upon its track near the place where he was killed, and at the time of the accident was being carried by defendant on hand cars with other workmen to his place of work. That his death was the direct result of the negligence of the defendant and its foreman and assistant foreman in charge of the hand cars in placing upon the one upon which her husband was being carried, too many men; in failing to maintain a reasonably safe distance between them; in running the cars at an unreasonable rate of speed; in failing to stop the car immediately following in time to avoid a collision; and in failing to provide proper and sufficient rules for the operation of its hand cars under such circumstances, all of which were alleged in violation of its duty.

The plaintiff also pleaded as a foundation for her right to recover damages the following statutes from the General Statutes of Kansas of 1901:

"Section 4871. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an

action therefor against the latter, if the former might have maintained an action had he lived against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

“Section 4872. That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in section 422 of chapter 80, Laws of 1868, is or has been at the time of his death in any other state or territory, or when, being a resident of this State, no personal representative is or has been appointed, the action provided in said section 422 may be brought by the widow, or where there is no widow, by the next of kin of such deceased.”

The petition stated that plaintiff resided in Missouri at the time of his death, and that no personal representative had been appointed.

The defendant pleaded and put in evidence section 1 of chapter 393 of the Laws of Kansas of 1903, entitled “An act to define the liability of railroad companies in certain cases” which is as follows:

“Section 1. That section 1, chapter 93 of the Laws of 1874, entitled, ‘An act to define the liability of railroad companies in certain cases,’ approved February 26, 1874, be and the same is hereby amended so as to read as follows: Every railroad company organized or doing business in this State shall be liable for all damages done to any employee of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage; provided, that notice in writing of the injury so sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad com-

pany within ninety days after the occurrence of the accident."

The evidence tended to show that the deceased was a Greek who came to this country in March, 1903, from his home in the little village of Lasteika in the province of Elis in that country, leaving his wife and four young children, the eldest eleven years old, in their former home, sending them money from his earnings for their support and declaring his intention to return to his home in four years.

Upon his arrival in this country he landed in New York City, went to Chicago, where he remained fifteen or twenty days; thence to St. Louis where he remained a month, working in a factory, and from there he went to Sycamore, Kansas, where he entered the service of the defendant railroad company, by which he was moved from place to place in the course of his employment, and at the time of his death he was working on defendant's railroad near Hope, Kansas, where he lived in a boarding car. The accident happened while defendant was taking the gang with which he was employed to their place of work near Hope. There were between thirty and forty in the gang who were being moved on four hand cars in charge of a foreman and his assistant. The deceased was riding on the third car, standing on the front end with his back to the front, pumping the car in the usual manner. The evidence tended to show that the fourth car hit the third one upon which the deceased was riding, knocking him off it, and the car then ran against him, breaking three of his dorsal vertebrae. He was sent to the defendant's hospital in St. Louis, where he died from the injury in about three weeks.

Under a rule of defendant three reports were made out for its information by employees present at the accident. These reports were produced on the trial. The court directed a verdict for the defendant, stating at the time that it was upon the ground that no notice had

been given by or on behalf of the deceased within ninety days after the occurrence of the accident as provided by section 1, chapter 393 of the Laws of Kansas 1903, already quoted. The motion for a new trial stated among others the following grounds:

"4. Because the court erred in holding that the provisions of the Act of the State of Kansas of March 4, 1903 (Laws of Kansas 1903, p. 599), were applicable to this case.

"5. Because the court erred in holding that the written notices of the injury, as made by defendant's laborers, were not a substantial compliance with the said act of the State of Kansas."

From the order of the court sustaining this motion, the defendant has taken this appeal.

I. This suit is founded upon section 422 of the Civil Code of Kansas, which provides that "when the death of one is caused by the wrong-

Negligence: full act or omission of another, the per-
Recovery for sonal representatives of the former may
Death: Laws of maintain an action therefor against the
Kansas: Liberally latter, if the former might have main-
Construed.

tained an action had he lived against the latter for an injury for the same act or omission." This section is coeval with Kansas, having been enacted by its first Legislature, in 1859; so that in that commonwealth the right of action for wrongful death has, as was said by its Supreme Court in *Atchison, Topeka & Santa Fe Railway Co. v. Fajardo*, 74 Kan. 314, "been as available as any of the common-law remedies." It is, as is said in the same case, "remedial in character, and should receive a liberal interpretation with a view of extending the remedy to those who have suffered damages from the death of a relative which was caused by the wrongful act of another." It was founded in the just and simple notion that if it be right to compensate the disabled man in damages for what he might

otherwise earn for the comfort and happiness of those whom the law of nature as well as the law of the land has committed to his keeping, it must also be right, in case of the more monstrous wrong of his death, that that portion of the compensation should pass directly to those upon whom the loss has fallen.

In 1874 Kansas, by its railway fellow-servant law, placed all railway employees in a class by themselves with respect to compensation from their employers for wrongful injuries, by including those cases in which the common-law right to such compensation had always existed with those in which the new right was given to be compensated for injuries suffered from the negligence of fellow servants, in one section of the statute, as follows:

“Every railroad company organized or doing business in the State of Kansas shall be liable for all damage to any employee of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees to any person sustaining such damage.”

These two provisions went hand in hand for twenty-nine years, when the following words were added to the one last quoted: “provided, that notice in writ-

Notice. ing of the injury so sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within ninety days after the occurrence of the accident.” [Laws 1903, sec. 1, chap. 93.] This law was in force at the time this injury was suffered, and the question as stated by the trial court was whether it is applicable to this suit for killing the deceased. Its words do not apply because notice can neither be given by the dead nor in their behalf, and they do not include notice given on behalf of one entitled to damages for the death of another. The death statute under which this suit is brought provides that the right to maintain it shall exist if the deceased

might have maintained an action had he lived . . . for an injury for the same act or omission. It is the death by the act or omission that gives the cause of action direct to the plaintiff under the statute, and the fact that the deceased, had he lived, might have maintained an action for an injury resulting from the same wrong, which determines the right to recover. There is nothing in the amendment of 1903 which indicates a purpose to apply it to suits for damages resulting from death and no reason why its construction should be strained for that purpose.

II. The statute provided that in all cases where the residence of the deceased was, at the time of his death, in any other State or Territory, or when being a resident of this State no personal representative is or has been appointed, the action may be brought by the widow. In this case the residence of the deceased was in Greece, where his family still remained at the time of his death. There is no evidence in the record that he ever acquired a residence in Kansas. He died in Missouri, which was also the home of the defendant corporation as admitted by the pleadings.

That an alien next of kin might bring this action for the death of an alien was held by the Kansas Supreme Court in *Railroad v. Fajardo*, supra. In that case the court says: "Residence in another State or territory means a residence outside of Kansas." The statute of Kansas (G. S. 1905, sec. 2875) provided that "when any person shall die intestate in any other State or country leaving any estate to be administered within this State, administration thereof shall be granted by the probate court of any county in which there is any estate to be administered." The Supreme Court of that State holds that this provision contemplates that "when a person dies intestate in any other State or country than Kansas, in order to authorize the

granting of letters testamentary or letters of administration the deceased must have left an estate to be administered within this State, and that estate must be something of a tangible nature to pay the costs and expenses of administration and the debts of the intestate, if any exist. The money recovered by the administrator in an action given by section 422 cannot be used for the costs and expenses of administration, or to satisfy the debts of the creditors of the deceased; and an action based upon this statute is not an 'estate' or 'assets' within the act respecting executors and administrators." [Perry v. Railroad, 29 Kan. 420, 423.]

The statement in the petition that the deceased died in Missouri is sufficient to show the capacity of the widow to bring the suit until defendant shall plead and prove that he left an estate to be administered in Kansas.

III. The defendant insists that there was no evidence to justify the submission of the case to the jury.

**Evidence: Question
for Jury.**

We have carefully read the testimony and while the plaintiff's evidence was somewhat conflicting we think it tends to prove negligence in the management of the hand cars directly contributing to the injury, and that the question of contributory negligence was for the jury to determine. The argument of defendant's counsel on this branch of the case is founded largely upon the theory that the plaintiff, having introduced the reports of the accident made to plaintiff by its employees under its rules, for the purpose of showing notice to the defendant, is bound by the statements of fact contained in them. We do not think that is the law, and the defendant has not directed our attention to any authority in support of his position. The statements prove that the men who made them reported to the defendant that they were true and nothing more.

We accordingly affirm the judgment of the circuit court granting a new trial and remand the case for further proceedings.

PER CURIAM.—This cause coming into Banc, the divisional opinion of BROWN, C., is adopted as the opinion of the court. *Lamm, C. J., Brown, Bond, Walker and Faris, JJ., concur; Woodson, J., dissents in an opinion filed; Graves, J., dubitante.*

DISSENTING OPINION.

WOODSON, J.—By reading the statement in this case, and the law applied thereto, it will be seen that our learned Commissioner has overlooked the case of *Mathieson v. Railroad*, 219 Mo. 542, l. c. 546, construing the act of the Legislature of Kansas which went into effect March 4, 1903, which reads as follows:

“Every railroad company organized or doing business in this State shall be liable for all damages done to any employee of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage; provided, that notice in writing of the injury so sustained, stating the time and place thereof, shall have been given by *or on behalf of the person injured* to such railroad company within ninety days after the occurrence of the accident.” (The italics are ours.)

In that case this court, after reviewing the authorities, unanimously held that the notice mentioned therein was a substantive element in the plaintiff's case, and that a petition based upon the laws of Kansas, omitting an allegation regarding the giving of said notice, failed to state facts sufficient to constitute a cause of action.

In a passing phrase, Mr. Commissioner BROWN, without considering the statute in any sense whatever,

brushes it aside as so much chaff by the following words: "Its words do not apply because notice can neither be given by the dead nor in their behalf, and they do not include notice given on behalf of one entitled to damages for the death of another."

If a solemn enactment of a Legislature, plain, simple and unambiguous as this statute is, can be brushed aside without thought or consideration, and with so little ink, then I would suggest that Legislatures be abolished, and that the law making and repealing power of government be placed in the hands of the judiciary, and thereby avoid the expense and necessity of going through the useless forms of legislation.

The statute in plain words says the injured party shall give the notice, or some one else shall give it for him. The mere fact that he dies of his injuries does not take the case out of either the spirit or letter of the statute, any more than if he should have been so badly injured that he could not have been physically able to give the notice. For that reason the italicized words of the statute were evidently added in order that death or physical inability would not destroy the cause of action, which the general terms of the statute would otherwise have done, had not said proviso been added authorizing others to give it for him.

Without the notice the plaintiff had no cause of action during life; and if he died without giving the notice, or some one for him, then he had no cause of action to survive to the plaintiffs, those referred to in the other statutes mentioned in the opinion of our learned Commissioner.

The simplicity of the facts of this case, and the statutes applicable thereto, causes one to marvel why sensible men can misunderstand them, except upon the theory that we are convinced of the fact that the legislature of a State is incompetent to enact laws for the government of its people, and therefore the courts must for righteousness' sake set aside or nullify them.

BETTIE FREEMAN et al. v. GEORGIA
MAXWELL, Appellant.

Division Two, November 24, 1914.

1. **WILL: Life Estate: Remainder: Construction.** A's will read, in part: "I hereby will and bequeath . . . to my daughters Dora, Annie, Maggie, and Amanda, severally, the sum of \$800 each, to be paid to them severally except to my said daughter Amanda; the share given her I bequeath to her sole and separate use, and I hereby constitute W her trustee" to lend or invest and manage her share for her, "paying over the interest thereon . . . for her support and maintenance, and any part of the principal if he shall deem it necessary, the balance remaining after the death of my said daughter to go to her surviving children share and share alike." Amanda's trustee invested her share in realty, taking title in himself as trustee, and put her in possession. She deeded a half interest in the land to her daughter Georgia, and by will devised a half interest in the remainder to the same daughter, her other children to have what was left. *Held*, that under A's will Amanda took a life estate only, with remainder to her surviving children, and therefore neither her deed nor her will was effectual to pass title.
2. ———: ———: ———: **Separate Estate: Land Purchased by Trustee.** The fact that the trustee of a fund given by will to a woman for her sole and separate use for life, remainder to her surviving children, when he invested the fund in realty and put her in possession took the title in himself as her trustee with no provision for the remainder to her children, does not defeat the remainder.
3. ———: ———: ———: ———: ———: **Trustee's Power of Disposing of Principal.** A's will bequeathed a fund in trust for his daughter's sole and separate use, remainder to her surviving children, the trustee to pay over the interest, and any part of the principal if he should deem it necessary, for her support. The trustee invested the fund in realty and put the daughter in possession, taking the title in himself as trustee with no provision as to the remainder. *Held*, that since there is nothing in the record to indicate that it ever became necessary to use any of the principal for the *cestui's* support, it cannot be presumed that the trustee in buying the land and taking the title as he did intended to exercise his power of paying her the principal and thought thereby to vest her with the fee in the land.

Appeal from Boone Circuit Court.—*Hon. David H. Harris*, Judge.

AFFIRMED.

H. D. Murry for appellant.

(1) The court erred in holding that Amanda Brashears had only a life interest in the rents and profits of the real estate in question and described in the petition of plaintiffs. This question depends upon the construction to be given the deed from McHenry Barkwell et al., to George W. Henderson, trustee for Amanda Brashears (a married woman), for her sole and separate use, and the will of Gilbert Akers, deceased. There are no words in either the deed or will which expressly limit Amanda Brashears's use to her life only. Nor are there any words which indicate an intention to so limit her estate and use in said land. Amanda Brashears under the will of her father, Gilbert Akers, and by said deed, took an equitable fee simple estate in the property therein bequeathed and conveyed to her. *Cornet v. Cornet*, 248 Mo. 184; *Guy v. Mayer*, 235 Mo. 390; *Settle v. Shafer*, 229 Mo. 561; *Jackson v. Littel*, 213 Mo. 589; *Sevier v. Woodson*, 205 Mo. 203; *Gannon v. Pauk*, 200 Mo. 75; *Gannon v. Albright*, 183 Mo. 238; *Roberts v. Crume*, 173 Mo. 572; *Roth v. Rauschenbusch*, 173 Mo. 582; *Yoacum v. Silver*, 160 Mo. 281; *Ryland v. Banks*, 151 Mo. 12; *Nichols v. Boswell*, 103 Mo. 151; *Small v. Field*, 102 Mo. 104; *Crew v. Keller*, 100 Mo. 362; *McLillen v. Larchor*, 45 N. J. Eq. 20; *Wolfer v. Hemmer*, 144 Ill. 554. (2) The court erred in not holding that the whole estate became executed in Amanda Brashears, the beneficiary, upon the death of her husband on March 22, 1910. Nothing can be plainer, under the decisions of this State, than that, where a trustee is appointed to hold the estate of a married woman, to protect it from the husband, as in

this case, and the marriage relations come to an end, her estate at once becomes executed in the person who is to take it, the wife, if living, or if she is dead, her heirs at law. In other words, when the conditions under which the trust or use ceased, the seizin and possession were transferred by operation of law to the beneficiary. Here, in this case, a trustee was appointed simply because the beneficiary has married Scott Brashears, and when he died, on March 22, 1910, the marriage relations ceased, the trust ceased, then the law executed the use in Amanda Brashears, and transferred to her the legal as well as the equitable estate. *Roberts v. Moseley*, 51 Mo. 282; *Pitts v. Sheriff*, 108 Mo. 116; *Small v. Field*, 102 Mo. 104; 1 *Sanders on Uses and Trusts* (Am. Ed.), 253; 2 *Washburn on Real Property* (3 Ed.), 461, sec. 45; *Morgan v. Moore*, 3 Gray, 323; *Stracy v. Rice*, 27 Pt. St. 75; *Mark v. Mark*, 9 Watts, 410; Sec. 2867, R. S. 1909; *Blumenthal v. Blumenthal*, 251 Mo. 703.

F. G. Harris and Finley & Sapp for respondents.

(1) The trial court correctly construed the will of Gilbert Akers as creating a trust for the benefit of Amanda Brashears and her children. (a) The intention of the testator is the controlling guide, and that intention must be gathered from the four corners of the will, in the light of the circumstances under which it was written. *Board of Trustees v. May*, 201 Mo. 60; *Grace v. Perry*, 197 Mo. 550; *Mueller v. Buenger*, 184 Mo. 458. (b) Item fifth of the will of Gilbert Akers created a trust fund for the sole and separate use of Amanda Brashears during her life with a remainder to her surviving children of so much of the *corpus* of the fund as remained after her death. *Harbison v. James*, 90 Mo. 411; *Garland v. Smith*, 164 Mo. 1; *Gibson v. Gibson*, 239 Mo. 490; *Ewing v. Shannahan*, 113 Mo. 196. (c) The trustee having active duties to per-

form, the trust was an active one as distinguished from a dry trust. *Webb v. Hayden*, 166 Mo. 48. (d) And the trust could not cease during the life of Amanda Brashears. This is true even though the trustee permitted her to reside on and have the use of the trust property. *Pugh v. Hayes*, 113 Mo. 434. (e) The fee simple title passed to the remaindermen upon the death of Amanda Brashears, the purpose of the trust having been accomplished. 28 Am. & Eng. Ency. Law (2 Ed.), p. 947; *Pugh v. Hayes*, 113 Mo. 434; *Ewing v. Shannahan*, 113 Mo. 196; *Gibson v. Gibson*, 239 Mo. 506. (f) The term "surviving children" excludes grandchildren, and the trial court properly held that the title is vested in the nine surviving children of Amanda Brashears. *Sullivan v. Garesche*, 229 Mo. 496; *Ringquist v. Young*, 112 Mo. 25. (2) The trial court correctly construed the deed to the trustee under which plaintiffs claim title. (a) Where land is purchased with money belonging to a trust fund a resulting trust is created in favor of those entitled to the fund. *Patterson v. Booth*, 103 Mo. 402; *Condit v. Maxwell*, 142 Mo. 266. And this is true even though the entire purchase money does not consist of trust funds. In such case a resulting trust will be decreed to the extent of the fund so applied. *Shaw v. Shaw*, 86 Mo. 594; *Bowen v. McKean*, 82 Mo. 594. (b) The fact that the husband furnished a part of the purchase money does not alter the title of plaintiffs and defendants as found by the court. The husband must be presumed to have intended to add to the trust fund the amount furnished. *Alexander v. Warrance*, 17 Mo. 228; *Viers v. Viers*, 175 Mo. 444; *Curd v. Brown*, 148 Mo. 82; *Ilgenfritz v. Ilgenfritz*, 116 Mo. 429; *Gilliland v. Gilliland*, 96 Mo. 522. (c) The legal title remained in the trustee or his heirs until the death of Amanda Brashears or until the trustee in the exercise of his discretion consumed the principal in the support and maintenance of the life tenant. The trustee had no au-

thority to change the uses to which the fund should be applied and his actions and report show that he did not so intend. *Arnold v. Brockenbrough*, 29 Mo. App. 625; *Cornwell v. Wulff*, 148 Mo. 542. And the fact that the deed failed to express a remainder over to the surviving children of Amanda Brashears cannot affect the rights of the remaindermen under the terms of the will creating the trust fund. The intention of the original donor must be kept in mind even in construing the deed to the trustee. *Clark v. McGuire*, 19 Mo. 312.

WILLIAMS, C.—This is a suit to determine the title to 80 acres of land in Boone county, Missouri, described as follows: The south half of the northeast quarter of section 4, township 48, range 13. The plaintiffs, Bettie Freeman, Birdie Davenport, Minnie Hernon, Pearl Anderson, Gardiner Brashears, James Brashears, Scott Brashears, Gilbert Brashears, and the defendant Georgia Maxwell, are the only surviving children of Amanda Brashears, deceased. In 1885, one Gilbert Akers, the father of said Amanda Brashears, deceased, died, leaving a will bequeathing a certain legacy in trust for his daughter Amanda. That portion of his will involved in this suit was as follows:

“Item Fifth. I hereby will and bequeath to my sons Thomas and Bartemius Akers, the sum of five hundred dollars each, and to my daughters Dora, Annie, Maggie and Amanda, severally the sum of eight hundred dollars each, to be paid to them severally except to my said daughter Amanda who has intermarried with Scott Lashires, the share given her I bequeath to her sole and separate use and I hereby constitute James H. Waugh her trustee to whom my said executors will pay over the share of my said daughter Amanda, and who will loan or invest and manage the same for the best interest of my said daughter, paying over to her the interest thereon as the same shall ac-

crue, for her support and maintenance, and any part of the principal if he shall deem it necessary, the balance remaining after the death of my said daughter to go to her surviving children share and share alike.

“Item Sixth. . . . And in case my estate after the death of my wife shall be insufficient to pay all said legacies in full, I direct that they shall be abated *pro rata*, and whatever excess there may be after paying said legacies (if any) I direct to be divided equally between my said daughters.”

Mr. James H. Waugh, named as trustee in said will, declined to act as such trustee and, on April 22, 1887, made application to the circuit court of Boone county, Missouri, praying that one George W. Henderson be appointed as such trustee in his stead. Said circuit court thereupon appointed said George W. Henderson as such trustee “to carry out the provisions of said will creating said trust.” It appears that the estate of said Akers was not sufficient to pay the various legacies in full and said Amanda’s legacy was reduced to the sum of \$648.13. This amount was paid by the executors of said Akers’ estate to the said George W. Henderson, trustee for said Amanda Brashears. The said trustee made no report to the circuit court for many years and at the October term, 1905, of the circuit court of Boone county, after citation to appear and make settlement, said trustee appeared and filed the following report.

REPORT AND SETTLEMENT.

Now at this day comes George W. Henderson, trustee for Amanda Brashears, and shows unto the court that heretofore, to-wit, on the 22d day of April, 1887, he was duly appointed trustee for Amanda Brashears in the place of James H. Waugh, who was named as her trustee in the will of Gilbert Akers, said will being duly recorded in the probate court records of Boone county, Missouri, in book E, page 422; that the resignation of the said James H. Waugh, as such trustee, and the appointment of his successor fully appears on the records of this court, in book P, page 84; that in pursuance of said order of appointment, he duly qualified and gave bond as required

and that said bond was duly approved by this court in its order of record, duly recorded in book P, page 134; that shortly after his appointment he received from Robert L. Todd, the executor of the last will and testament of the said Gilbert Akers, the following personal property and money, to-wit:

The said circuit court approved the report of the trustee and excused him from making any further settlement in the matter "until the further order of the court." The real estate involved in this suit is the same real estate that was purchased by said George W. Henderson, trustee, as mentioned in his above report, and "George W. Henderson, trustee for Amanda Brashears, for her sole and separate use," was named as the grantee in said deed. It is admitted that the grantors in said deed were the owners of said land upon the date of the execution of said deed. Said Amanda Brashears died March 17, 1911, and her husband Scott Brashears died March 22, 1910. It also appears that said George W. Henderson, trustee, is dead. The date of his death is not shown. The separate answer of defendant Georgia Maxwell contained first a general denial and further alleged that she was the owner in fee simple of the east 40 acres of this tract and further that she was the owner in fee simple of an undivided one-half interest in the west 40 acres of said tract. Plaintiffs replying to said separate answer allege that "the entire claim of title made by said defendant is based upon conveyances by, through and under Amanda Brashears, the mother of said defendant; that said Amanda Brashears was in fact entitled to a life estate only in the lands described in plaintiffs' petition and had no right or authority to convey the same, or any part thereof, to said defendant, Georgia Maxwell." Defendant Georgia Maxwell testified that from 1904 until the death of her father and mother she resided with them on the farm, doing work on the farm and about the house, and caring for her parents in their old age. She introduced in evidence a deed dated October

5, 1910, whereby said Amanda Brashears undertook to convey by straight warranty deed to said Georgia Maxwell the east 40 acres of the land involved in this suit, reserving to the grantor a life estate therein. Defendant then introduced in evidence the last will and testament of said Amanda Brashears. By this will testator bequeathed all her personal property to her said daughter Georgia Maxwell. The will further provided that of the real estate of which testator might die seized an undivided one-half thereof was devised to said Georgia Maxwell and the remaining one-half to her other children, naming them, and the children of certain deceased children. It was admitted upon the trial that the land is now worth from \$2000 to \$2500. The case was tried by the court without a jury. The court found that said Amanda Brashears left nine surviving children, being the same nine persons above named. The court found that these nine surviving children were the owners in fee simple, as tenants in common, of the real estate described in plaintiffs' petition, and that said Amanda Brashears had only a life interest in the rents and profits of said real estate and that therefore defendant Georgia Maxwell received no title to said land by reason of the deed and will executed by said Amanda Brashears. The court thereupon adjudged that said nine surviving children were owners in fee of said land and that each of said children was seized of an undivided one-ninth interest in said land and that the other parties to this action, to-wit; the grandchildren of said Amanda Brashears, had no title or interest in or to said land. Defendant Georgia Maxwell alone appealed.

For the purposes of this review, we will consider the case as though the entire purchase price of the land was supplied from the trust fund provided by the will of Gilbert Akers, and will not take

Will: into consideration the fact that \$166 of
Life Estate: the purchase price was advanced by the
Remainder: husband of Amanda Brashears. This for
Construction. the reason that such appears to be the
theory upon which the case was tried in the circuit
court. Whether this payment of \$166 of the purchase
price of the land purchased by the trustee would op-
erate to establish to that extent a resulting trust in
said land in favor of the husband, or whether said pay-
ment was intended as an addition to the trust fund pro-
vided by the will of Gilbert Akers and to be controlled
by the directions of said will, or still further whether
it was intended that said payment should be consid-
ered as a separate and distinct trust estate to be con-
trolled by the terms of the deed conveying the land
to the trustee, would on account of the present unde-
veloped record on that feature of the case be impos-
sible to determine with accuracy, hence we leave that
point where the parties themselves have seemed con-
tent to leave it, i. e., outside the consideration of the
case.

What interest then did Amanda Brashears acquire
in the trust fund by the will of her father, Gilbert
Akers? This is the vital question presented by this
appeal. Whatever interest she acquired in the trust
fund by said will could be followed into the land in
which the fund was invested. [Patterson v. Booth, 103
Mo. 402, l. c. 413.]

If the will gave her an absolute equitable interest
in the trust fund, then her interest in the land pur-
chased with said fund would be an equitable fee simple
estate. If she owned the land in fee simple either as a
legal or equitable estate, she could by will or deed
make conveyance of same (Ryland v. Banks, 151 Mo. 1;
1 Perry on Trusts [6 Ed.] 321) and in that event de-
fendant Georgia Maxwell would, by virtue of the deed
from her mother, become the owner of the fee to the
entire east 40 acres, and by her mother's will the owner

of an undivided one-half interest in the fee to the west 40 acres.

If, on the other hand, Amanda acquired by said will only a life estate in the income from said fund, then her interest in the land would be a life estate and neither her deed nor will could convey the fee to Georgia Maxwell.

The clause of the will requiring interpretation is as follows:

“Item Fifth. I hereby will and bequeath Thomas and Bartemius Akers, the sum of five hundred dollars each, and to my daughters Dora, Annie, Maggie and Amanda, severally the sum of eight hundred dollars each, to be paid to them severally except to my said daughter Amanda who has intermarried with Scott Lashires, the share given her I bequeath to her sole and separate use and I hereby constitute James H. Waugh her trustee to whom my said executors will pay over the share of my said daughter Amanda, and who will loan or invest and manage the same for the best interest of my said daughter, paying over to her the interest thereon as the same shall accrue, for her support and maintenance, and any part of the principal if he shall deem it necessary, the balance remaining after the death of my said daughter to go to her surviving children share and share alike.”

It will be noticed that this clause of the will is composed of but one sentence. If the clause terminated after the word “severally,” in the fourth line thereof, there could be no doubt but that an absolute interest in said money was vested in Amanda Brashears. But the clause does not end there and the very next word we encounter is “*except*.” Then follows the provision providing for the appointing of a trustee, the payment of the legacy to the trustee, and directions to the trustee to invest the fund and to pay the interest therefrom, and any part of the principal the trustee may deem necessary, for the support and maintenance of

said Amanda. Then the sentence continues as follows: "the balance remaining after the death of my said daughter to go to her surviving children share and share alike." If we should construe this will in harmony with appellant's contention, it would in effect be to erase from the will the words last above quoted. Those words are not ambiguous in meaning, but are as clear in meaning as any portion of said clause, and being bound to the first part of the clause, as a part of an exception with reference to the interest Amanda shall take in testator's property, it appears to us that it is the key to the true intent of testator. We have carefully reviewed the many authorities cited by appellant in support of her contention. Some of the cases cited hold that a remainder over, after what purports to be a devise of the fee, is void. But that is no longer the law of this State, as will appear from a reading of the case of Gibson v. Gibson, 239 Mo. 490, wherein the Missouri cases on the subject are reviewed and some of the cases cited by appellant are expressly overruled. Appellant cites another line of cases holding that what would otherwise be a fee or absolute estate in the first taker cannot be reduced to a less estate by words of ambiguous meaning. These cases, undoubtedly, declare the settled law in this State on that proposition, but have no application to the present case for the reason that the words used by the testator in the present case are not ambiguous in meaning but clearly express an intention on the part of the testator that such portion of said trust fund as should not be necessarily used by the trustee for the support and maintenance of Amanda should go to the surviving children of Amanda.

The intention of the testator must control. It is the duty of the court, not to make, but to construe wills, and when once the true intention of testator is ascertained, operating within a sphere not prohibited by law, that intention should prevail and be enforced.

Neither is the result in the present case to be changed by reason of the fact that the deed conveying the land to the trustee fails to provide for the remainder over in the surviving children of the named *cestui que*. The directions of the donor, Gilbert Akers, testator and settlor of the trust, and not the granting words of the grantor in said deed, who receives in payment for said land the money from the trust fund, should be allowed to control the channel of the trust estate (*Clark v. Maguire*, 16 Mo. 302, l. c. 312-3), and especially so where, as here, the rights of an innocent purchaser without notice are not involved. But, says appellant, the trustee was given power by the will of the settlor to dispose of the principal of said trust fund for the support of Amanda, and having the deed made to the land in that manner amounted to an exercise of the power of disposal lodged in the discretion of the trustee, and therefore Amanda became by said deed vested with the fee simple title.

We are unable to agree with this contention. The trustee took the legal title in his own name. By the terms of the will his trust was an active one, as distinguished from a dry trust (*Pugh v. Hayes*, 113 Mo. 424, l. c. 431-434; *Webb v. Hayden*, 166 Mo. 39, l. c. 48), in that he had a continuing control over the trust estate to see that Amanda received the interest therefrom, and if that should not be sufficient to meet the requirements, he was given the power, within his discretion, to use such of the principal as he might deem necessary for her support and maintenance. There is nothing in the record to indicate that it ever became necessary to use any of the principal for her support, and in the absence of clear and cogent proof on that point it will not do to infer that the trustee did that which it appears he did not do and which there would appear no valid reason for doing.

Smelser v. Railroad.

Other legal propositions are discussed by appellant in her brief and we have given them careful consideration, but since the conclusions above announced are decisive of the interests of the respective parties in said land, it becomes unnecessary to discuss other legal questions which could not change the above result.

It follows that the judgment of the court is correct and should be affirmed. It is so ordered. *Roy, C.*, concurs.

PER CURIAM.—The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. All the judges concur.

JOSEPH E. SMELSER, Administrator, v. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, Appellant.

Division Two, November 24, 1914.

1. **CONTRIBUTORY NEGLIGENCE: Assuming Place of Obvious Danger: Brakeman.** On defendant's line of railroad was an elevated platform, on which was a track, alongside of certain coal chutes, and next to them was a board wall six feet high. The distance from the track to this wall was thirty-seven inches, and the distance between the outer side of a car on this track and the wall was seven inches. There was no proof that the space between the track and the wall was ever used or intended to be used by brakemen to step into after coupling cars on the track. Deceased, an experienced brakeman, for three years in the employ of defendant, for three months a brakeman on the train, familiar with the platform and coal chutes and having frequently coupled cars on this track, was directed to assist the engineer, about nine o'clock at night, of July 5th, in taking two empty cars from the platform, and it was his duty to attend to coupling them to the other cars of the train. The cars were provided with automatic couplers, and when the engine backed up to the first car it coupled without difficulty; but the coupler failed to work on the second car,

and the brakeman went over or through the cars and got down between them to open the coupler. Having done that, instead of climbing into the car and signaling the engineer from there to move the engine, he stepped out, between the track and the wall of the chute, and signaled the engineer with his lantern, and the engineer, responding thereto, moved the cars, with the result that the brakeman was caught in the narrow space between the side of the car and wall, his body crushed, and the injuries caused his immediate death. *Held*, that the danger was obvious and apparent, and deceased knowingly put himself in a place of peril, and under the circumstances he was guilty of such contributory negligence as bars a recovery by his administrator.

2. **NEGLIGENCE: Pleading: Next of Kin: Allegation of Damage.**

Held, by WALKER, J., that, in a suit by an administrator based on Sec. 5426, R. S. 1909, an allegation that "deceased was an unmarried man and left surviving him a father, mother, brothers and sister as his next of kin," is sufficient as to the existence of beneficiaries; but a petition which fails to contain any allegation of loss sustained by them by reason of his death, does not state a cause of action for substantial damages under the statute, and not even for nominal damages unless the proof shows his death was due to defendant's negligence.

Appeal from Howard Circuit Court.—*Hon. Alex. H. Waller*, Judge.

REVERSED.

J. W. Jamison for appellant.

(1) Plaintiff's action was bottomed on Sec. 5426, R. S. 1909, known as the compensatory section of the Damage Act, and not on section 5425 of said act, as the latter section has application only in those cases where death is occasioned "by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car or train of cars." The right of action given under Sec. 2864 (now Sec. 5425) is not that given under Sec. 2865 and 2866 (now Secs. 5426 and 5427) and that given under the two last named

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sections is not that given under the former. These are purely statutory rights of action, and each must rest on its own statute. *Casey v. Transit Co.*, 205 Mo. 724; *Peters v. Railroad*, 150 Mo. App. 728. When a laborer employed by a railroad company is killed in consequence of the use of defective apparatus, a cause of action accrues under section 5426 and not under section 5425 of the Damage Act. *Holmes v. Railroad*, 69 Mo. 536; *Higgins v. Railroad*, 197 Mo. 312; *Rapp v. Railroad*, 106 Mo. 423. (2) The petition being under the compensatory, and not the penal, section of the Damage Act, under the allegations of the petition and the evidence, the court committed error, both in overruling defendant's demurrer to plaintiff's petition and in overruling defendant's instruction in the nature of a demurrer to the evidence. *Johnson v. Mining & Development Co.*, 171 Mo. App. 134; *Boyd v. Railroad*, 155 S. W. 13; *Railroad v. McGinnis*, 228 U. S. 173; *Railroad v. Daugherty's Admr.*, 155 S. W. 1119; *Rich v. Railroad*, 148 S. W. 1011. (3) Under the authorities supra, plaintiff's instruction on the measure of damages, authorizing the jury to assess plaintiff's damages "at such sum as they deem fair and just with reference to the necessary injury resulting from the death of the deceased, James Edward Riley, not exceeding the sum of \$10,000," was erroneous. (4) The evidence clearly shows that the deceased was guilty of contributory negligence as a matter of law. *Huss v. Bakery Co.*, 210 Mo. 44. Upon the admitted facts "reasonable men can entertain but one view of the conduct of the deceased, and that adverse to him, and the question, therefore, resolves itself into one of law." *Mockowik v. Railroad*, 196 Mo. 550; *Buckner v. Horse & Mule Co.*, 221 Mo. 700. The narrowness of the platform was not the proximate cause of his death, but his negligence in placing himself in a perilous position, and his negligent signaling for the engine. *Fulwider v. Gas Light & Power Co.*, 216 Mo. 582; *Devitt*

v. Railroad, 50 Mo. 302; Stoeckman v. Railroad, 15 Mo. App. 503; Woodson v. Railroad, 224 Mo. 685; Wheeler v. Wall, 157 Mo. App. 38; Sands v. Brewing Co., 131 Mo. App. 413. Where a person fails to employ his faculties to become aware of confronting dangers, or, knowing thereof, to use reasonable care to avoid it, the law calls his conduct careless because out of harmony with ordinary prudence and loads it with entire responsibility of the consequences, notwithstanding the negligence of another may have aided in producing them. Diamond v. Kansas City, 120 Mo. App. 185; Purcell v. Shoe Co., 187 Mo. 276; Hulett v. Railroad, 67 Mo. 238. (5) Deceased chose the obviously dangerous position on the platform beside the coal chute, and remained there when he had every opportunity to get in or upon the car in a safe place, before signaling for the engine to back and push the car forward. There can be no recovery by his administrator in this action. Hulett v. Railroad, 67 Mo. 239; Smith v. Box Co., 193 Mo. 715; Moore v. Railroad, 146 Mo. 572; Brewer v. Railroad, 56 Mich. 620.

Samuel C. Major and Frank W. McAllister for respondent.

(1) It may be conceded that this action is based on Sec. 5426, R. S. 1909. (2) Appellant contends that plaintiff's petition fails to state a cause of action, because it does not allege what deceased was earning or that he "contributed in any sum toward the support of his father, mother, brothers and sister, who were his next of kin;" and that, as there was no evidence of these facts, defendant's instruction, in the nature of a demurrer, at the close of plaintiff's evidence should have been given. This contention is based, and appellant relies for support of it solely, upon the majority opinion of the Springfield Court of Appeals in the case of Johnson v. Dixie Mining and Development

Company, 171 Mo. App. 134. That case was decided by a divided court, ROBERTSON, J., dissenting from the majority opinion of FARRINGTON, P. J., and the concurring opinion of STURGIS, J., and the former being of the opinion that the majority opinion was in conflict with recent decisions of this court, requested that the case be certified to this court, where it is now pending. The majority opinion and the concurring opinion therein entirely ignores the earlier case of Morgan v. Oronogo Circle Mining Company, 160 Mo. App. 99, decided by that court. The opinion in the Johnson case is directly in conflict with the holding in the Morgan case, but the latter case is not referred to in the opinion in the former case. The majority opinion and the concurring opinion in the Johnson case hold, in effect, that in suits brought under Sec. 5427, R. S. 1909, by the administrator of a deceased adult who left no wife, minor child or minor children, the administrator sues as the trustee of an express trust for the benefit of those who are entitled to the amount recovered under the laws of descent, as provided in section 5425, and that it is necessary for him to allege and prove the names of such persons and facts showing the pecuniary loss they have sustained, that is, that they were dependent upon, had some financial interest in, or received some financial benefit from the deceased. The conclusions reached rest primarily upon the assumption that the provision of section 5425, directing that in a suit by an administrator the amount recovered shall be distributed according to the laws of descent, applies to a suit and recovery by an administrator under section 5427. We do not believe that the language of section 5427 justifies such construction. Section 5426 fixes the liability of the offending party, and does no more. It is left entirely to section 5427 to designate the parties who shall be entitled to sue and recover on the liability fixed by section 5426, and it does this by providing that "the damages accruing under the last

preceding section shall be sued for and recovered by the same parties and in the same manner as provided in section 5425." Under section 5425, the parties who are entitled to sue and recover are: first, the husband or wife; second, the minor child or minor children; third, if the deceased be a minor, the father and mother; and fourth, "if there be no husband, wife, minor child or minor children, natural-born or adopted as hereinbefore indicated, or if the deceased be an unmarried minor and there be no father or mother, then in such case suit may be instituted and recovery had by the administrator or executor of the deceased." Section 5427 refers to the above section for two purposes only: first, to designate the parties who may sue for and recover the damages; and, second, that the damages shall be sued for and recovered in the manner provided in that section. It does not expressly or by implication refer to the provision of section 5425 that the amount recovered shall be distributed according to the laws of descent, and it is a far-fetched judicial construction that can make it appear to apply the damages recovered under section 5426. If the provision of section 5425, that "the amount recovered shall be distributed according to the laws of descent," does not apply to suits under section 5427, then the theory and contention that plaintiff sues as trustee of an express trust for the benefit of those who would take the amount recovered according to the laws of descent must, of course, necessarily fail, and it must be held that the administrator sues in his capacity as administrator for the benefit of the estate of deceased. Although it should be concluded that the provision of section 5425 applies to suits under section 5427, yet, appellant's contention must fail. There is no sort of basis in the language of the statute for the contention that an administrator or executor can sue only when deceased left next of kin dependent upon him for support, or that dependency of next of kin in any wise affects his right

to sue and recover. The language is "in such case, suit may be instituted and recovery had by the administrator or executor of the deceased." In construing a new statute of doubtful meaning, amendments to the original bill should be looked to, and the journal of the General Assembly may be resorted to for this purpose. Sec. 6287, R. S. 1909; 36 Cyc. 1138; *Ex parte Helton*, 117 Mo. App. 609; *State v. Kooek*, 202 Mo. 223. It is evident that the Legislature did not intend to limit the right of recovery by an administrator or executor to the pecuniary loss suffered by those who were dependent upon deceased, and that to so construe the statute is to interpolate into it words which were stricken out of the House bill by amendment 21905, and the effect of which is to give the statute a meaning directly in conflict, not only with the plain words of the statute itself, but with the evident purpose and intention of the Legislature. *Southern Pacific Co. v. Wilson*, 85 Pac. (Ariz.) 401; *James v. Railroad*, 95 Ala. 231; *Railroad v. Sullivan*, 120 Fed. (Fla.) 799; *Searle's Admr. v. Railroad*, 9 S. E. (W. Va.) 248.

(3) The damages recoverable in this action are for the benefit of the estate, and the measure of damages is the loss to the estate of deceased by reason of his death. Sec. 5427, R. S. 1909; *Hudson v. Railroad*, 159 S. W. 14; *Keeny v. McVoy*, 206 Mo. 65; *Stubbs v. Mulholland*, 168 Mo. 73; *Bingham v. Birmingham*, 103 Mo. 345. The administrator is entitled to recover what the deceased would probably have accumulated if he had lived. *Railroad v. Benedict*, 159 S. W. (Ky.) 526; 13 Cyc. 366; *Electric Co. v. Bowden*, 15 L. R. A. (N. S.) 451; *Railroad v. Sullivan*, 120 Fed. 799; *Coal Co. v. Enslen*, 129 Ala. 336; *Southern Pacific Co. v. Wilson*, 85 Pac. (Ariz.) 401; *Railroad v. Orr*, 91 Ala. 548; *Railroad v. Foxsworth*, 41 Fla. 1; *Railroad v. Massie*, 128 S. W. (Ky.) 330.

(4) Appellant's contention that deceased was guilty of contributory negligence, as a matter of law, is based

upon the assumption that it was admitted, or not controverted by any evidence in the case, that deceased, after going between the cars and adjusting the coupling, moved back against the wall or back of the chute and signaled, by waving his lantern, for the engine and cars to be moved, and that he thereby invited the movement of the train while he was in a position of danger; but that is not what the evidence shows. The witness, Elmer Carter, was on top of the chutes, and testified that while he could not see deceased's lantern, he could and did see the reflection of the light from the lantern on the banister, and that he saw no movement of the reflection, or any movement, indicating any movement or signal with the lantern. Wheeler also testified that he saw no movement of deceased's lantern or the reflection thereof. The witness also testified that the car moved back just about the time he heard the noise made by deceased opening the knuckle which shows that deceased did not have time, after opening the knuckle, to have stepped back and given a signal for the engine to move before the engine and car moved and he was caught. These witnesses were in better position to see and to know whether deceased gave a signal for the movement of the engine, than any other witnesses who testified in the case. Whether deceased gave a signal for the movement of the engine and cars while he was in a dangerous place was a question for the jury. *Brady v. Railroad*, 206 Mo. 530; *Black v. Railroad*, 172 Mo. 188; *George v. Railroad*, 225 Mo. 402. There is no assumption of risk in this case. The servant assumes the risks incident to his employment, but he never assumes the risk of injury occasioned by the master's negligence. *Curtis v. McNair*, 173 Mo. 280; *Charlton v. Railroad*, 200 Mo. 433; *Yougue v. Railroad*, 133 Mo. App. 152; *Honea v. Railroad*, 245 Mo. 621; *Railroad v. McDade*, 191 U. S. 67. It would have been such a simple matter for defendant to have constructed a platform, on the opposite side of the

track from the chutes, for the use of its employees who were compelled to go upon the elevated track to couple and uncouple cars and perform other duties. The cost would have been a mere bagatelle. As said in the McDade case, it was so simple a task and so devoid of all exigencies of expense, necessity or convenience that not to make such a construction safe for the use of its employees "is a conviction of negligence." It is well-settled law that the servant is not obliged to refuse to use an appliance, or quit the service of the master, if he reasonably believes that by proper care and caution he can safely use the appliances, notwithstanding they are not so reasonably safe as the master is required to furnish. Mere knowledge of the defect is not, as a matter of law, sufficient to defeat plaintiff's action if the danger therefrom was not so obvious as to threaten immediate injury. *Lee v. Railroad*, 112 Mo. App. 406; *Corby v. Telephone Co.*, 231 Mo. 442; *George v. Railroad*, 225 Mo. 405. (5) Under the testimony of witnesses, Carter and Wheeler, deceased did not place himself in an "obviously dangerous position on the platform opposite the coal chutes" and signal for the engine to move backward.

WALKER, P. J.—Plaintiff, as administrator of the estate of James E. Reilly, deceased, brought suit against defendant, a railway company, in the circuit court of Howard county, under section 5426, Revised Statutes 1909, for \$10,000 damages for the death of said Reilly through the alleged negligence of the defendant. Upon a trial a verdict and judgment was rendered in favor of plaintiff in the sum of \$8000, from which defendant appeals.

James E. Reilly, at the time of the accident and for three years prior thereto, had been employed by defendant as a railway brakeman on one of its trains running from Hannibal to New Franklin. On the night

of July 5, 1909, while in the discharge of his duty as a brakeman, at Wilcox, a coal station, he was directed with the aid of the engineer, to take two empty cars from an elevated track opposite certain coal chutes and set two other cars loaded with coal thereon, and in so doing he was caught and crushed to death between one of the cars and the wall of the coal chutes.

Defendant's track on the platform opposite the coal chutes was about fourteen feet above the level of the ground; the level portion of same, about 200 feet long, was reached by a switch track laid on an incline formed of trestle work; at the north end of the platform were six coal chutes; these chutes extended above the elevated track eight feet, and each was provided with a trap door to load coal into tenders of engines on the main line; the back of the chutes presented a solid wooden wall adjacent to the back of the platform or elevated track. The height of the wall above the platform was something more than six feet; the track on this platform was parallel with the wall, the nearest rail of same being about thirty-seven inches from the wall; the distance from the outer edge or side of a car when on this elevated track, to the face of the wall, was seven inches. On the opposite side of the track from the wall the body of a car, when on the elevated track, extended over the full width of the platform; the cars were provided with automatic couplers, and when the engine backed up to the first car, as directed by Reilly, it coupled without difficulty, but the coupler failed to work on the second car, and Reilly went over or through the cars, evidently open coal cars, and got down between them to open the coupler. This he did, and instead of climbing into the car and signaling the engineer to move the engine, he stepped out, between the track and the wall of the chute, and signaled the engineer with his lantern, and the latter responding thereto moved the cars with the result above stated.

The contention of the plaintiff is that the defendant should have furnished a space sufficiently wide between the outside of the car and the wall to enable one after coupling cars to stand there in safety, or, in other words, that it was negligence on the part of the defendant to leave only seven inches of space between a car on the elevated track or platform and the wall; that Reilly although familiar with the location, was not chargeable with contributory negligence in stepping into this space, instead of climbing back into the car before he gave the signal.

The petition summarized is as follows:

Plaintiff alleges his appointment as administrator of the estate of James E. Reilly and that he brings this suit as such; that deceased was an unmarried man, twenty-two years of age, who left surviving him no wife or minor child or children, but a father, mother and brothers and sister, as his next of kin; that at the station of Wilcox on defendant's line of railway it had constructed an elevated track reached by inclined trestle work, and had built thereon a platform elevated about fourteen feet above the surface of the ground, over and upon which cars were moved by defendant for the transfer of coal from the cars into coal chutes; that said platform was built along the back of the chutes; that the back of the chutes extended about eight feet above the elevated track and platform and was solidly boarded up, forming a dead wall for a length of about forty feet; that the intervening space between the back of the chutes and the sides of cars standing on the tracks opposite thereto, was not sufficiently wide to afford employees a safe place to work while engaged in coupling and uncoupling cars on said elevated track; that defendant had negligently failed to construct and maintain a platform, walk-way or passage on the side of said elevated platform opposite said wall upon which defendant's employees might stand in safety when coupling or uncoupling cars on said elevated track, and

while the same were being moved thereon, and by reason of the premises said elevated track, platform, etc., were unsafe for the use of the employees of defendant who were required in the discharge of their duty to go and be upon said elevated platform and track in moving cars to and from said chutes, and in coupling and uncoupling cars thereon; that deceased was a brakeman on one of defendant's trains, and while in the performance of his duties as such, was directed to take two empty cars standing on the elevated track immediately opposite the coal chutes from the platform and place two other cars loaded with coal thereon; that it then and there became his duty to go upon said elevated track and platform and couple the engine with the said cars and couple the cars thereon together; that he had coupled the engine to the nearest car, and had gone to the end of the other car to make another coupling, and while so engaged at about the hour of nine o'clock at night, on the 5th day of July, 1909, by reason of the aforesaid negligence of defendant he was caught in the narrow space between the side of the car coupled to the engine and the back of said coal chutes, and his body crushed and such injuries inflicted that he then and there died. Plaintiff in his prayer states that the death of said Reilly was caused by the negligence of defendant and that plaintiff as administrator of the estate of deceased is entitled to recover the sum of ten thousand dollars by reason of said death.

Defendant demurred to the petition on the ground that it failed to state facts sufficient to constitute a cause of action; that it affirmatively appeared on the face of the petition that deceased was guilty of contributory negligence; that he had full knowledge of the conditions and dangers incident to his employment, which were open, obvious and apparent to him, and that he had assumed the risk of any injury sustained. This demurrer was overruled, and defendant answered

over, first, by general denial, and further that whatever injuries deceased sustained, if any, were occasioned by his own negligence contributing directly thereto, in that he went upon the elevated track and after he had made the coupling he negligently got upon the platform between the cars and the wall of the chute while the cars were being moved, instead of putting himself in a position of safety by getting upon the car before the same was moved; and, further, that he negligently placed himself on the side of the car next to the wall, and gave a signal for the moving of the engine necessary for the coupling of the cars, and in so doing placed himself in a position of danger; that he was further negligent in giving signals with his lantern for the movement of the engine and cars while standing between the wall and the sides of the cars instead of placing himself in a position of safety before giving the signal, as he might have done, from one of said cars; that he was further negligent in taking his position on the side of the platform next to the wall where he was in danger of being crushed, instead of placing himself in a position of safety upon one of the cars, and giving a signal therefrom; that by virtue of his contract of employment it was the duty of the deceased to couple cars elsewhere, as well as upon defendant's elevated track; that he was an experienced brakeman who had frequently before the accident coupled and uncoupled cars at night time, upon this elevated track, and at other tracks of similar character; that the dangers, if any, were open and obvious, and that by reason of the premises he had assumed the risk of all injuries received on the occasion mentioned in plaintiff's petition.

The defendant assigns error in the overruling of its demurrer to plaintiff's petition, in the court's refusal to give an instruction in the nature of a demurrer to the evidence; that the finding of the jury is against the evidence and the admitted physical fact that de-

fendant placed himself in a position where he was bound to be crushed, and signaled and invited the movement of the train, which resulted in his death; that the court erred in giving improper instructions asked by plaintiff and in refusing proper instructions asked by defendant.

I. Defendant challenges the sufficiency of the petition in that it does not charge wherein
Pleading: the next of kin of the deceased have suffered pecuniary loss by reason of his
Next of Kin: death through the alleged negligence of
Damages. the defendant.

The next of kin, to-wit, the father, mother, brothers and sister of deceased are named in the petition, but aside from a general allegation of damages in the prayer, there is in the pleading no reference to injury suffered by anyone as a result of the death of decedent. The court could not, of course, be guided by the prayer in determining the nature of the relief sought. [State ex rel. v. Barnett, 245 Mo. 99.]

As an elementary proposition in measuring the sufficiency of a petition of the character of the one under consideration, it may be stated generally, proper regard being had for the statute upon which the action is based, that the same rules of pleading are applicable as in an action for personal injury.

The right of action being statutory (Casey v. St. L. Tr. Co., 205 Mo. 721, 724; Id., 116 Mo. App. 235), the allegations of the petition should be sufficiently full and definite to bring the cause clearly within the purview of the statute, in conformity with the general rule that an action based upon a statute should charge such facts as will bring it within the terms of the act creating it. [Williams v. Railroad, 233 Mo. 666, 681; Gilkeson v. Railroad, 222 Mo. l. c. 183.]

While no greater certainty is required in the pleading than is found in the statute itself, at least those

facts which the latter names as the basis of the right of action, should be set forth. [31 Cyc. 115, and cases.] There is, however, a more cogent reason than the foregoing, and one more particularly applicable to the case at bar, why the petition should set forth the material portions of the statute upon which the action is based. By the terms of the statute the jury, within the limit named, are authorized to assess the damages at such sum as they may deem to be fair and just, reference being had to the necessary injury resulting from the death to the surviving parties who may be entitled to sue. These conditions are material parts of the statute and stamp it as compensatory. [Honea v. Railroad, 245 Mo. l. c. 645; Boyd v. Railroad, 236 Mo. 54; Hegberg, Admr., v. Railroad, 164 Mo. App. 514, 559; Johnson v. Mining Co., 171 Mo. App. 134, 143.] Such being the character of the action the parts indicative of its nature are required to be proved to authorize recovery thereunder, and it is, therefore, necessary that they be pleaded. [Safford v. Drew, 3 Duer, 627, 633; Serenson v. Railroad, 45 Fed. 407.] This court in thus determining the character of this statute has on account of its unmistakable terms only found it necessary heretofore to declare it to be compensatory without alleging the reasons for this conclusion. In Hegberg v. Railroad, *supra*, and Johnson v. Mining Co., *supra*, NIXON and FARRINGTON, JJ., of the Springfield Court of Appeals, at different times and in different cases, have respectively elaborated with force and clearness not only the reasons why this statute is compensatory, but that being so, its material parts should be pleaded and proved. In addition, the purpose of each of the sections forming this statute and their relations to each other are succinctly defined by STURGIS, J., in a concurring opinion filed in the Johnson case, *supra*, leaving nothing more to be said on this question save by way of repetition.

It may be contended, as has been inferentially stated in opinions rendered by this court construing this statute, that an action thereunder brought in general terms, as in the case at bar, implies pecuniary loss to the beneficiaries from the death, and in the absence of pleading and proof of such loss a recovery may be had for at least nominal damages. While no reason has been stated here for this implied ruling, it is held in other jurisdictions that damages necessarily flow from the negligent killing and that whenever there is proof of such negligence on the part of the defendant and of the existence of next of kin, the action will lie at least for nominal damages. [Tiffany, *Death by Wrongful Act* (2 Ed.), sec. 180, and cases cited under note 174.]

However, except to determine whether the petition states a cause of action under any circumstances, the question of nominal damages is not involved in this case. Keeping in mind the general observations heretofore made in regard to the sufficiency of a petition of the character of the one at bar, notwithstanding this suit is brought by the personal representative, it becomes necessary for us to determine whether the following material facts have been properly pleaded: (1) the existence of beneficiaries such as "are entitled to sue" within the contemplation of the statute (Sec. 5427, *supra*), and (2) the personal injury suffered by such beneficiaries from the death of the decedent through the alleged wrongful act of the defendant.

Under the terms of the statute the verdict of the jury is to be determined by "reference to the necessary injury resulting from the death to the surviving parties who may be entitled to sue."

The correctness of the conclusion reached in the *Hegberg* and *Johnson* cases, *supra*, is not questioned, that where suit is brought by a personal representative, as here, he sues under the statute as a trustee of an express trust for such existing beneficiaries as are

named under section 332, Revised Statutes 1909, and by these beneficiaries are meant "such surviving parties as are entitled to sue" within the meaning of the statute under which the action is brought. The St. Louis Court of Appeals has reached a like conclusion in *Troll, Admr., v. Laclede Gas Light Co.*, 182 Mo. App. 600. In other jurisdictions under statutes similar, and in some instances almost identical, with the one here under review, it is held where suit is authorized to be brought by a personal representative for a wrongful death, the existence of the beneficiaries should be alleged. [*Oulighan, Admr., v. Butler*, 189 Mass. 287; *Vander Wegen v. Great Northern Ry. Co.*, 114 Minn. 118, 121; *Webster v. Norwegian Mining Co.*, 137 Cal. 399; *Railroad v. Maxwell*, 113 Tenn. 464, 473; *Village of Assumption v. Campbell*, 95 Ill. App. 521; *C. B. & Q. Ry. Co. v. Oyster*, 58 Neb. 1.]

But it is not necessary that such beneficiaries should be named other than to indicate their relationship to the deceased. [*Conant v. Griffin*, 48 Ill. 410; *Pennsylvania Co. v. Coyer*, 163 Ind. 631; *Howard v. Del. & H. Canal Co.*, 40 Fed. 195, 6 L. R. A. 75.]

We find that the petition in the instant case alleges that "deceased was an unmarried man . . . who left surviving him a father, mother, brothers and sister as his next of kin." This is a sufficient allegation as to the existence of beneficiaries and in this respect the petition is not subject to objection.

II. Relative to the necessity of an allegation of damages in the petition. As we have heretofore stated generally while it has been impliedly held here and expressly held elsewhere, under petitions framed as in the case at bar, that a verdict for nominal damages may be sustained, the rule seems to be well established, where substantial damages are sought, to require the facts to be alleged showing the pecuniary loss

Negligent
Killing of
Next of Kin:
Allegation of
Damages.

occasioned by the death of the decedent. Under the statute in question the jury, within the limit named, may award such damages as may be deemed fair and just, reference being had to the necessary injury resulting to the beneficiaries. In no other manner than by proof can it be determined what damages are fair and just in each particular case, reference being had to the injury caused by the death of decedent. Proof being necessary it can be admitted only under a pleading authorizing same.

In many cases based on statute similar to the one under consideration, it is held that a distinction is to be drawn between actions on behalf of beneficiaries so related to the deceased that the law imposed upon him, while living, the duty of their support, and those actions in which the beneficiaries were not so related; it being held in regard to the first class that it is enough if the petition shows the existence of such beneficiaries, the pecuniary loss or injury being thereby sufficiently averred (*Peden v. Am. Br. Co.*, 120 Fed. 523; *Kearney Elec. Co. v. Laughlin*, 45 Neb. 390; *City of Friend v. Burleigh*, 53 Neb. 674); but in the second class it is necessary that the petition allege facts showing an actual pecuniary interest in the life of the decedent and a consequent loss by reason of his death. [*Thompson v. Railroad*, 104 Fed. 845; *Greenwood v. King*, 82 Neb. 17; *Orgall v. C. B. & Q. Ry. Co.*, 46 Neb. 4.] No such distinction obtains here and in view of the plain and unequivocal terms of the statute we are of the opinion that the petition should allege the loss sustained by the beneficiaries by reason of the death of the decedent regardless of the degree of their relationship to him. [*Rouse v. Electric Ry.*, 128 Mich. 149, 155; *Regan v. Railroad*, 51 Wis. 599, 602.] Lacking this essential averment the petition does not state a cause of action for substantial damages and this will suffice to determine the issue adversely to the plaintiff, unless, upon an examination of the facts, it is disclosed

that decedent came to his death through the negligence of the defendant, in which event the petition is sufficient to sustain a verdict for nominal damages which will authorize a reversal and remanding of the cause.

III. Do the facts authorize a verdict for nominal damages? The decedent was an experienced brakeman. He had been employed in that capacity by defendant for three years prior to the accident which resulted in his death. For three months immediately preceding the accident he had been brakeing on the particular division on which the elevated track and coal chutes were situated and had frequently at night time coupled cars at this point. Thus familiar with the surroundings, as he must have been on account of the character of his labor, it would be contrary to all human experience if he did not know the relative locations of the switch track and the dead wall or back of the chutes. Armed with this knowledge, if possessed with average intelligence, and there is nothing to indicate the contrary, he must have known that the space between a car on the switch track and the dead wall was not sufficient to permit one to stand there without being crushed. In addition, he must have known that this space was not intended for the use of brakemen but simply to enable cars placed there for unloading to "clear" or be moved back and forth on the switch track without striking the wall. There is no evidence that the space between a dead wall and the car track, at such locations as we find here, is ever used or is intended to be used by brakeman to step into after coupling cars; on the contrary, the evidence as to the custom at this particular location and elsewhere under similar circumstances is that after a coupling is made the brakeman climbs into the car and therefrom gives the engineer the signal to move. Instead of so doing, the decedent stepped into the seven-inch space

Contributory
Negligence:
Assuming
Place of
Obvious
Danger.

between the track and the wall, and with his lantern signaled the engineer to move the car which crushed the life out of decedent.

The books afford few parallels to this reckless disregard of one's own safety. We cannot characterize decedent's conduct other than that of contributory negligence. Fully aware of the conditions and dangers incident to his employment, which were not obscure but were open, obvious and apparent, he knowingly put himself in a place of peril and it must be held that he assumed the risk of the injury sustained. There are, therefore, no facts upon which a finding for even nominal damages can be sustained, and the judgment of the trial court is reversed. *Brown and Faris, JJ.*, concur in paragraph three and the result.

ANDREW J. FORGEY et al., v. MARY V. GIL-
BIRDS, Appellant.

Division Two, November 24, 1914.

1. **CONTRACTS: Cancellation: Specific Performance: Fraud: Mutuality.** A widow and two children, Sarah and Noel, survived John F. Gilbirds, who died intestate seized of the legal title to 840 acres of land heavily encumbered. Sarah sued to enforce an alleged oral agreement to partition, and appealed to the Supreme Court from a decree vesting the title to all the land in the widow, her mother. The widow thereafter executed a deed to a trustee, which empowered him to manage the property, or if need be sell any part of it, for the purpose of paying off the incumbrances, together with debts of the grantor amounting to over \$1800, the remainder to go to her for life and then in fee to her son and his wife. At about the same time she contracted to sell a portion of the land, and when she found she could not perfect title on account of Sarah's pending appeal in the partition suit, she entered into a contract with Sarah and her husband, dated April 28, 1909, by which it was agreed that the trustee should convey to the widow for life, with remainder in Sarah; that Sarah

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should dismiss her appeal in the partition suit; that the proceeds of a sale of 334 acres, for which all parties agreed to make deeds, should go to pay the widow's debts and reduce the incumbrances; that the widow should, for her life, lease the remainder to Sarah and her husband for \$300 a year, the lessees to pay all taxes and insurance; and that the lessees should have the right to sell, "as soon as practicable and on the best terms obtainable," all or any portion of the premises to further reduce the incumbrances, the widow agreeing to join in all deeds necessary to carry out any such contract of sale. Sarah's appeal was dismissed and the provisions of the contract were carried out, until Sarah's husband, in July, 1910, made a contract, which Sarah afterwards ratified, for the sale of sixty-four acres of the remaining land, whereupon the widow refused to join in a deed. To a suit for specific performance brought by Sarah, her husband and the contracting purchaser, the widow answered asking that the contract of April, 1909, be cancelled as unconscionable, not supported by valid consideration, and procured by false representations. She testified that, to induce her to sign, her daughter told her the \$300 a year rent was a mere form—that she should never want. The evidence shows that the income from the premises was only about \$865 a year, which left very little in the hands of Sarah and her husband after they made the payments specified in the contract of 1909.

Held, that, in view of all the facts, the trial court's refusal to cancel the contract of 1909 must be upheld, especially since there is no showing in the record that Sarah's appeal in the partition suit was other than meritorious, or that she refused or failed to carry out her promise to provide additional support for her mother.

Held, also that, since the contract of 1910, which must be considered together with that of 1909, definitely fixed the price and described the land; was mutual as regards the widow and the purchaser; was a sale "as soon as practicable and on the best terms obtainable," and was ratified by Sarah, the trial court was right in decreeing that the widow should perform specifically by joining in a deed to the purchaser.

2. **SPECIFIC PERFORMANCE: Undisclosed Principal.** Specific performance may be enforced either by or against an undisclosed principal when his duly authorized agent, in his own name, within the scope of the agency, has contracted concerning the sale or purchase of the principal's land.

Appeal from Pike Circuit Court.—*Hon. B. H. Dyer*,
Judge.

AFFIRMED.

Pearson & Pearson for appellant.

(1) The court erred in entering a decree against appellant: First: Because she was not a party to the contract with George W. Jacobs. Persons not parties to a contract cannot be required to specifically perform the same. *Otto v. Young*, 227 Mo. 215; *Luther v. Stillwell*, 73 Mo. 499; *Pomeroy*, Spec. Perf. Contracts (2 Ed.), p. 210, sec. 147; *Fry's Spec. Perf.* (5 Ed.), pp. 80, 94 and 171, secs. 205, 167 and 347; 36 Cyc. 595, sec. 6; *Waterman on Spec. Perf.* (1881 Ed.), pp. 80 and 120, secs. 58 and 92. Second: Because there is no mutuality of either right or remedy as to appellant. Neither appellant nor her interest in the property are mentioned or made known to George W. Jacobs, contracted with or for, by him in this contract. She is in no way privy to this contract—an absolute stranger. Equity will not specifically enforce a contract and sale of land, unless there be mutuality both as to obligation and remedy. *Glass v. Row*, 103 Mo. 539; *Mastin v. Halley*, 61 Mo. 200; *Paris v. Halley*, 61 Mo. 458; *Huff v. Shepard*, 58 Mo. 247; *Holman v. Conlin*, 143 Mo. 378; *Davis v. Petty*, 147 Mo. 383; *Tenny v. Turner*, 111 Mo. App. 600. Third: Because no consideration has passed, or been proffered to appellant, by respondent Jacobs for the execution and delivery of a deed to the land in question. *Davis v. Petty*, 147 Mo. 383; *Lipscom v. Adams*, 193 Mo. 546; *Rosewald v. Middlebrook*, 188 Mo. 89. Fourth: Because respondent Jacobs has never purchased nor contracted to purchase from appellant any land, nor the interest in any land owned by appellant. This contract is in the face of the Statute of Frauds, requiring contracts for the sale of real estate to be in writing, and signed by the party to be charged. Sec. 2783, R. S. 1909. (2) Respondents have no standing in a court of equity, seeking to

enforce the specific performance on the part of appellant, of a clause in the contract of 1909, favorable and beneficial to them, when they have not performed the whole of that which they contracted to do. *Rosenberger v. Jones*, 118 Mo. 567; *Mastin v. Halley*, 61 Mo. 202; *Improvement Co. v. Tower*, 158 Mo. 292; *Secret Service Co. v. Gill-Alexander Mfg. Co.*, 125 Mo. 156; *Clay v. Mayer*, 183 Mo. 159. Respondents did not wash their hands before they entered the Supreme Court. They agreed to pay off the remaining incumbrance, in consideration of appellant having deeded to them the remainder interest in all of her property. Appellant caused such a deed to be made. Respondent Sarah J. Forgey now has title to such remainder interest and appellant gets nothing for that interest. Removal of the incumbrances was the consideration to be paid on respondents' part for this remainder interest. The contract of 1909 is not definite and certain. There was no mutuality. Even if enforceable, respondents have not complied with the terms and conditions of this clause of the contract. (3) Appellant would further insist, that she should not be forced to perform this contract made by Forgey with Jacobs, because, it would thereby force the performance of the contract of April 28, 1909. Which contract, as its terms and the evidence in this case show, is: First: A biting, unconscionable contract, supported by a boggy and inadequate consideration; second: Procured by deception and false and fraudulent representations; third: Forced, by the stress of financial embarrassment, after the appellant had been led to believe that respondents were ready and willing to assist her by making an entirely different contract; fourth: That respondents have failed to show a performance on their part of each essential ingredient of the contract, which, by the terms of the contract is to be performed by them; fifth: That by the allegations in the petition, respondents affirmatively show, that they have not complied with the

terms of the contract as a condition precedent to their rights to have appellant perform the same on her part; and, that such a decree, would produce injustice; and, would be inequitable, considering all the circumstances of this case. *Gottfried v. Bray*, 208 Mo. 658; *Clay v. Myer*, 183 Mo. 158; *Holman v. Conlin*, 143 Mo. 378; *McIlroy v. Maxwell*, 101 Mo. 305; *McQuay v. Land Co.*, 230 Mo. 361; *Real Estate Co. v. Spellbrink*, 211 Mo. 710; *Pomeroy v. Fullerton*, 131 Mo. 710; *Kirk v. Middlebrook*, 201 Mo. 288; *Rosenwald v. Middlebrook*, 188 Mo. 88; *Lampton v. Chensy*, 186 Mo. 551; *Gloeckner v. Kittlaus*, 192 Mo. 495.

Frank J. Duvall and *Hostetter & Haley* for respondent.

(1) In equity suits appellate courts defer largely to the finding of the trial courts on account of the superior vantage ground of the trial judge in observing the demeanor of the witnesses. (2) A party cannot be permitted to avoid the effect of a contract by an assertion that the other party to the contract agreed that its terms should not be binding; nor will the party be permitted to deny that it expresses the agreement which he made; nor can a contract be avoided by one of the parties thereto on the ground that he did not read it (he being *sui juris*), or that if he read it he did not understand its terms. *Jones v. Shaw*, 67 Mo. 667; *Smith v. Thomas*, 29 Mo. 307; *Bank v. Fesler*, 89 Mo. App. 226; *Wislizenus v. O'Fallon*, 91 Mo. 184; *Crim v. Crim*, 162 Mo. 544, 54 L. R. A. 502; *Mfg. Co. v. Carle*, 116 Mo. 591; *England v. Houser*, 163 S. W. 890; *Avery Co. v. Powell*, 161 S. W. 335; *Beck v. Obert*, 54 Mo. App. 240; *Ely v. Sutton*, 162 S. W. 755; *Bank v. Bank*, 244 Mo. 594; *Berheret v. Myers*, 240 Mo. 75. (3) Courts of equity will enforce contracts which are fair and reasonable and will decree specific performance of the same, not as a matter of grace, but as a matter

of right. *Evans v. Evans*, 196 Mo. 1; *Kilpatrick v. Wiley*, 197 Mo. 123; *Pomeroy's Equity Jurisprudence* (3 Ed.), sec. 1404; *Hardy v. Matthews*, 42 Mo. 406; *McQuitty v. Wilhite*, 247 Mo. 163. It is frequently said (somewhat loosely, we think) that courts grant specific performance of contracts in the exercise of a discretion, thus leaving the inference at least, that it is entirely discretionary with the court whether it will grant the specific performance or not. This is not the correct interpretation to put on such expressions. The discretion mentioned is not an arbitrary, or capricious one, but is a sound judicial discretion, and controlled by established principles of equity as applied to the facts of the case. *Land & Lumber Co. v. Blackman*, 202 Mo. 307; *Kirkpatrick v. Pease*, 202 Mo. 493; *Berberet v. Myers*, 240 Mo. 58; *Hunting & Fishing Club v. Hackman*, 156 S. W. (Mo. App.) 791. As to the question of mutuality: An undisclosed principal may sue on and enforce a contract made for the sale of realty by his agent in his (the agent's) own name. *Davidson v. Hurty*, 133 N. W. 862, 39 L. R. A. (N. S.) 324; *Schmucker v. Grain Co.*, 28 Okla. 721. Likewise an agent may contract for the purchase of land for an undisclosed principal and the latter may maintain a suit in his own name and enforce the contract, it being immaterial whether the principal was known or unknown during the transaction, or whether the party supposed he was dealing with the agent personally, and on his own behalf. *Kelly v. Thuey*, 143 Mo. 438; *Pomeroy, Specific Performance* (2 Ed.), sec. 89; *Fry, Specific Performance* (3 Ed.), sec. 238; *Otto v. Young*, 227 Mo. 193; *Randolph v. Wheeler*, 182 Mo. 145. A contract for the sale of land may be specifically enforced although it is not signed by both the parties thereto. *Mastin v. Grimes*, 88 Mo. 478. The remedy of specific performance is based upon the existence of a contract between the parties to the suit or between

those through whom they claim. 26 Am. & Eng. Ency. Law (2 Ed.), p. 20. The principle that contracts must be mutual and binding upon both parties does not, it has been held, mean in every case that each party must have the same remedy for a breach by the other, but only that the contract is enforceable on both sides in some manner, not necessarily by specific performance in each instance. 26 Am. & Eng. Ency. Law (2 Ed.), p. 32. (4) Unconscientious conduct and acts by a plaintiff in order to prevent specific performance must be confined to misconduct in regard to or at all events connected with the matter in litigation. Pomeroy's Equity Jurisprudence (3 Ed.), sec. 399. (5) The construction which the parties have placed upon a contract themselves is strongly persuasive with a court in interpreting its meaning. The defendant in a suit for specific performance who had theretofore acted on the contract as it was understood by the plaintiff is bound thereby, and cannot set up the defense that the contract was to be construed differently, and that the plaintiff had refused to carry it out according to such different construction. 26 Am. & Eng. Ency. Law (2 Ed.), p. 42. Mrs. Gilbirds in her arrangement with Dr. Morrow conceded by the express terms of the deed that it was absolutely necessary that the land should be sold so as to provide the money with which to pay off the encumbrances; and in the contract with Mr. and Mrs. Forgey of April 28, 1909, in addition to it being expressly provided that they should sell the land and use the money derived therefrom in discharging the remaining encumbrances, to-wit, the \$5800, Mrs. Gilbirds herself acted upon the theory that it was the meaning of that contract that Mr. and Mrs. Forgey should sell sufficient land to pay off the remaining encumbrances, but her chief objection was to them selling the home tract. She will not now be permitted under the authorities to claim a different interpretation of the contract from

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that which she voluntarily placed upon it at and subsequent to the time it was drawn.

WILLIAMS, C.—This is a suit for specific performance of a contract whereby plaintiffs seek to compel defendant to join with the plaintiffs Sarah J. and Andrew J. Forgey in conveying to plaintiff Jacobs the title to 65 acres of land located in Pike county, Missouri. Defendant filed a general denial and in her answer, seeking affirmative relief, asked to have the written contract cancelled, on the grounds of fraud and misrepresentation in its procurement. Trial was had in the circuit court of Pike county, resulting in a decree in favor of plaintiffs and denying defendant the affirmative relief sought, and directing that the money derived from the sale be used in paying off the encumbrance. Defendant thereupon perfected an appeal. In 1904, appellant's husband, John F. Gilbirds, died intestate, vested with the legal title to a tract of 840 acres of land situated near Bowling Green, Pike county, Missouri. The 65 acres involved in this suit, and known as the Home Farm, was a portion of said tract of land. Said Gilbirds left surviving him his widow, Mary V. Gilbirds (appellant herein), and two children, Sarah J. Forgey (respondent herein), and Noel F. Gilbirds. Sarah married Andrew J. Forgey (respondent herein) a short time before her father's death. A few months before his death, said Gilbirds, his wife joining him therein, executed two separate deeds of trust. One deed of trust to secure the sum of \$18,000, covering all of said land except 120 acres; the other deed of trust for \$800, covering the remaining 120 acres. Some time after the death of said Gilbirds, the widow and the heirs joined in making a sale and conveyance of about 140 acres of this land to a Mr. Quinn for \$3600, which money was applied on the mortgage indebtedness. Later a controversy arose between the widow and her children with reference to the division of the land and,

as a result thereof, Sarah J. Forgey, joined by her husband, brought a partition suit to enforce an alleged parol partition agreement. It appears that as a defense to said suit the widow set up the claim that she had furnished the entire purchase price for said 840 acres of land at the time that it was purchased and the title taken in her husband's name. A trial of this suit was had resulting in a decree in favor of the widow (appellant herein), and by said decree the legal title was divested out of the heirs of her said husband and vested in her. Mrs. Forgey thereupon perfected an appeal in said cause to this court.

A few months thereafter, Mrs. Gilbirds, being joined by her son Noel and his wife, executed a deed conveying all of their interest in and to the remaining 700 acres of this land to one Winn F. Morrow, of Kansas City, Missouri, in trust. Mr. Morrow was the father-in-law of Noel F. Gilbirds. This deed recited that all of the land conveyed belonged to Mary V. Gilbirds except 160 acres thereof which belonged to Noel F. Gilbirds and his wife. The deed recited that the property was encumbered by the \$18,000 mortgage; that there was then interest due to the amount of \$720, and that Mrs. Gilbirds was indebted to a law firm in the sum of \$800 for legal services, and also indebted to Maud M. Gilbirds in the sum of from \$300 to \$500. Said deed further stated that it was the desire of the first parties thereto to have all of said property managed by said Morrow and to subject portions of said land to sale for the purpose of discharging the debts in said deed mentioned and to provide for the final distribution and descent of said property. The trustee was empowered to take possession of, manage and control the property and to make sale of any portion or portions of the property, as he might see fit, for the purpose of raising funds with which to discharge the above-mentioned debts. The instrument further provided that after said indebtedness was paid off in the above man-

ner, the title of said real estate should revert as follows: The remaining portion of the land belonging to Noel and his wife should revert to them and be held by them as it was before the trust conveyance was made. The remainder of the property was to go to Mary V. Gilbirds for life with remainder over to Noel F. Gilbirds and his wife as tenants in common. At about this time, whether before or after the trust deed was executed to Morrow, it does not clearly appear, Mrs. Gilbirds had contracted to sell about 134 acres of this land to George W. Chapple for approximately \$7000 and she also desired to make sale of about 160 acres of the land to her son Noel for the price of about \$4400, which price was about \$5000 less than its market value. After the property was conveyed to Mr. Morrow, Mrs. Gilbirds became dissatisfied with the arrangement provided in the trust deed; and was also unable to perfect title to the 134 acres contracted to be sold to Mr. Chapple and to the 160 acres to her son Noel, without Mrs. Forgey and her husband joining in making the conveyances. This, apparently, due to the fact that the appeal in the partition suit was pending in the Supreme Court and the purchasers were unwilling to pay the purchase price unless the Forgeys joined in the conveyance. In this situation, Mrs. Gilbirds employed an attorney for the purpose of aiding her in getting the title back from Mr. Morrow and to make general adjustment of the situation, whereby sales could be made of sufficient property to pay the indebtedness and title thereto delivered to the purchasers. The attorney made a trip to Kansas City and then took the matter up with the attorney for the Forgeys with a view to making an entire adjustment of the situation. These negotiations continued for several weeks, finally resulting in the trustee, Mr. Morrow, making conveyance of all of said land, except the 160 acres owned by Noel and his wife, to Mary V. Gilbirds (appellant herein) and Sarah J. Forgey (respondent here-

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in). The deed provided that Mrs. Gilbirds should have a life estate in said real estate only and that the remainder in said property was vested in Sarah J. Forgey. As a part of the settlement, it was further agreed that the Forgeys would dismiss their appeal in the partition suit then pending in the Supreme Court. On the same day that this deed was executed, and as a part of the general adjustment of the situation, the following contract, dated April 28, 1909, was entered into by and between Mary V. Gilbirds as first party and Sarah J. Forgey and Andrew J. Forgey as second parties:

This contract made and entered into this 28th day of April, 1909, by and between Mary V. Gilbirds, party of the first part, and Sarah J. Forgey and Andrew J. Forgey, parties of the second part, and all being of Pike county, Missouri,

Witnesseth: Whereas, the real estate described in a certain deed made by Mary V. Gilbirds, Noel F. Gilbirds and Maude M. Gilbirds to Winn F. Morrow dated July 3, 1909, and recorded in book 142 at page 561 of the deed records of Pike county, Missouri, is encumbered by a certain deed of trust originally given to the Prudential Insurance Company of America, which deed of trust is recorded in Vol. 128 at page 118 of the deed records of Pike county, Missouri, and upon which deed of trust there now remains due and unpaid approximately a little over fifteen thousand dollars, and whereas there is another encumbrance of eight hundred dollars on a portion of said real estate which was given originally to the People's Savings Bank of Bowling Green, Missouri, and whereas it is the intention of the parties to this instrument that the title to said lands shall be transferred from the said Winn F. Morrow back to said Mary V. Gilbirds during her life with remainder to her daughter, Sarah J. Forgey, and it is further the intention of the parties to this instrument that the encumbrance above mentioned, together with certain other debts which the said Mary V. Gilbirds is liable for, which debts are mentioned in said deed from Mary V. Gilbirds et al. to Winn F. Morrow, shall be paid off or reduced as far as possible in the following manner, by applying the proceeds of the sale of about 184 acres of said lands to George W. Chapple on said indebtedness and also by applying the proceeds of the sale of 160 acres of said land to Noel F. and Maude M. Gilbirds on said indebtedness, it being the intention of the parties to this instrument to make suitable deeds to consummate the transfer of the title to said parties.

The said parties of the second part in consideration of the premises hereinafter mentioned agree and obligate themselves to

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pay off and discharge the remaining encumbrance against said land remaining after such transfers so mentioned shall have been made, under the conditions as hereinafter stated, so that in the end whatever lands there may remain shall be free and clear of any encumbrance now existing and to that end it is agreed by and between the parties hereto as follows: That the real estate mentioned in said deed to said Winn F. Morrow except those portions to be conveyed to George W. Chapple and to Noel F. and Maude M. Gilbirds shall be conveyed to Mary V. Gilbirds for and during her natural life, the remainder, after her life estate to be vested in Sarah J. Forgey with this proviso, however, that in the event Sarah J. Forgey shall die before the said Mary V. Gilbirds, then such remainder shall revert back to said Mary V. Gilbirds and vest in her.

It is further agreed by the parties to this instrument that the said Mary V. Gilbirds leases to the said parties of the second part all of said real estate the title to which remains in her for and during her natural life, at a fixed annual rental of three hundred dollars (\$300) payable quarterly, the first installment of seventy-five dollars being due and payable immediately, and the second payment of seventy-five dollars to be due and payable on June 1, 1909, and the remaining installments of \$75 at the end of each succeeding three months thereafter during the lifetime of the said Mary V. Gilbirds or until the termination of this lease by the death of Sarah J. Forgey before the death of said Mary V. Gilbirds, which contingency is the only event the happening of which will terminate this lease unless the same shall be terminated by the voluntary consent and agreement of all the parties to this instrument.

It is further understood and agreed that in addition to the payment of the \$300 per annum rent the parties of the second part will pay and discharge all taxes against said land which may hereafter become due and payable during the existence of this lease.

It is further understood and agreed that the parties of the second part will pay all necessary insurance premiums on the buildings on said premises and will look after keeping said premises in repair.

It is further understood and agreed that the party of the first part will give possession of said premises within a reasonable time and that said parties of the second part shall have the exclusive right to manage, control and lease said premises and collect all rents arising therefrom and receive the benefit of all the products of said premises during the continuance of this lease.

It is further understood and agreed that the parties of the second part shall have the right to sell all or any portion of said premises either for the purpose of applying the proceeds of such sale or sales to the discharge of the remaining encumbrances against said premises or for the purpose of reinvesting, and the said party of the first part agrees to join in all necessary deeds to carry out such contract of sales as may be negotiated by said parties of the

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second part, it being the desire and intention of all of the parties to this instrument that so much of the real estate which shall be conveyed back to Mary V. Gilbirds by the said Morrow shall be sold as soon as practicable and on the best terms obtainable in order that the encumbrance which remains against said lands shall be paid off and discharged to the end that whatever remains of said lands, the title to which shall be in said Mary V. Gilbirds and Sarah J. Forgey, as above stated, may be free and clear of encumbrance.

It is further understood and agreed that whatever sales of any portion of said premises may be consummated by said parties of the second part the proceeds of the same shall be devoted and applied to the payment and extinguishment of the encumbrances now existing on said premises until the same shall be fully discharged, and it is further agreed that this lease shall continue and remain in force during the natural life of said Mary V. Gilbirds unless sooner terminated by the mutual consent and agreement of all parties hereto or by the death of said Sarah J. Forgey happening before the death of said Mary V. Gilbirds.

It is further understood and agreed that all existing contracts for the leasing of all or any portion of said premises shall enure to the benefit of the said parties of the second part and they shall have the right to collect from said tenants who may be holding by existing leases whatever rents may be due from them for the use of said premises.

In witness whereof the parties have hereunto set their hands to this and a duplicate contract on the day and date above written.

(Signed)

MARY V. GILBIRDS,
SARAH J. FORGEY,
A. J. FORGEY.

At the time this contract was made Mrs. Gilbirds was 67 years old, Mrs. Forgey 31 years old and Mr. Forgey 61 years of age.

In order to assist in consummating the settlement, Mr. Forgey advanced to Mrs. Gilbirds' attorney the sum of \$1250, the greater portion of which was used in paying off obligations of Mrs. Gilbirds which were mentioned in the trust deed to Mr. Morrow. After the foregoing contract was executed all the necessary parties joined in making conveyances of the land to Mr. Chapple and to Noel F. Gilbirds to the 160 acres and the proceeds of these two sales were applied on the mortgage indebtedness, reducing the same to approximately \$5000, and arrangements were made by which a

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local bank of Bowling Green became the purchaser of the balance of said mortgage indebtedness. Mr. Forgey took charge of the land, improved some of the fences, placed a tenant on the home tract and rented a greater portion of the farm to tenants and exercised general supervision over the farm; collected rents; paid the accrued interest on the loan, the insurance on the buildings and the taxes on the land during the years 1909 and 1910. In July, 1910, said Andrew J. Forgey entered into a contract with George W. Jacobs (one of respondents herein), whereby said Forgey agreed to sell and convey to said Jacobs for the sum of \$7500 the 65 acres now involved in this law suit. Mrs. Forgey did not join with her husband in making the contract of sale with Jacobs but later executed a separate, written ratification of said contract, directing that said written ratification be attached to the original contract between Mr. Forgey and Mr. Jacobs. Mr. Forgey had been attempting to make a sale of the home tract for some time and had received an offer of \$100 per acre for the same from another party and finally made the foregoing agreement whereby the purchase price was fixed at \$115 per acre. When the time came for consummating the deal and making the conveyance of the property to said Jacobs, Mrs. Gilbirds refused to sign the deed and thereafter this suit was instituted. The evidence shows that Mr. Forgey collected as rents from the tenants on the farm in cash rents and grain rents an average of about \$865 for each of the years of 1909 and 1910. That he paid Mrs. Gilbirds each year the sum of \$300, as provided in the contract, and six per cent interest on the \$5800 encumbrance amounting to \$348 per year. This would leave in his hands each year the sum of approximately \$225, out of which he had to pay the taxes, insurance and repairs. The evidence does not show what these last items amounted to each year. The evidence on the part of the Forgeys tended to show that they had complied in full with their

part of the contract with Mrs. Gilbirds; and in addition had offered to let her come to their home and live, which she did for a few weeks, and that they had purchased a home for her near their home in Paynesville, Missouri, and had asked her to send for her household goods, move into the house and occupy it as her home, but that she refused to move into the house. Mrs. Forgey testified that she had given her mother several dresses and considerable clothing, and that before the contract was signed she had told Mrs. Gilbirds's attorney that she would always take care of her mother and that she would not want for anything. The evidence on the part of Mrs. Gilbirds was to the effect that before she signed the contract she made objection to the amount of \$300 being provided for her support, and made the statement that it was not enough for her to live on and that her daughter told her that the \$300 was a mere matter of form and that she would see that she would never want for anything, and that after the contract was signed she was treated coolly when she went to live at her daughter's house; that she did not blame her daughter for this but blamed her daughter's husband. That Mr. and Mrs. Forgey owned a general store at Paynesville and that she purchased some small articles at different times and that each time Mr. Forgey paid her the quarterly rent of \$75 he deducted therefrom the amount of her bill at the store. She denied that Mr. Forgey had purchased the home for her at Paynesville, but admitted that they had invited her to use it as her home. The evidence further showed that Mrs. Gilbirds, aside from her interest in the farm, owned an equity in a city lot in Bowling Green, Missouri, diamonds valued at \$4000 and household furniture.

The following excerpts are fair samples of the testimony of Mrs. Gilbirds concerning the contract, etc.:

"Q. Did you or did you not believe the statements made to you by your daughter, that that \$300 consid-

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eration didn't amount to anything, and that she would see that you wanted for nothing? A. Yes, sir, I certainly did, or I never would have signed it in the world.

"Q. Coming back to the question: What did Mrs. Forgey say to you at my residence that Sunday afternoon, which you say deceived you? A. She didn't say so much at your residence, except to state that she wanted me to have my own spending money, that the \$300 wasn't enough for me to live on, and that she would give me all I wanted, and she said, 'I will get your clothes and things, and they shan't cost you anything.'

"Q. All that Mrs. Forgey said, was that she wanted you to have your own spending money, and you know that I will take care of you? A. Yes, sir.

"Q. That's all she said? A. Yes, sir, I think that's all she said.

"Q. That, you think, was an inducement for you to sign the contract? A. She offered me more, she said, 'You come down and live at my home, and I will make you comfortable.'

"Q. Did that influence you to sign the contract? A. No, sir, because I knew if things didn't suit me there I wouldn't stay—

"Q. That was a bad contract, this contract of April 28, 1909, that was a cut-throat contract, I believe you stated? A. Yes, sir.

"Q. When did you make up your mind that it was? A. I made up my mind that it was before I signed it.

"Q. You admit, then, that you read the contract over three times before you signed it? A. I read the lower part where he was to get my crops and everything from the place.

"Q. You read that? A. Yes, sir.

“Q. You still say it was a week or ten days before you actually signed it, and during that time you saw the contract, you called at Judge Gray’s office and saw the contract, you say, three times, and read it; is that right? A. I guess so, if you say so.

“Q. I am not saying anything; I am asking you about it. A. I don’t scarcely know. I looked at it at least three different times, in case that I wanted to read it, but I don’t know that I read it that many times, and I thought she would be good and kind to me, and that her husband would treat me nice and kind, I thought she would do it again, and I signed the contract, and I found out that they didn’t do as they had agreed and their treatment was cold—

“Q. Mrs. Gilbirds, Mrs. Forgey on the witness stand said that she had always given you whatever you needed; state to the court whether she has provided all you want or not. A. No, sir, and she knows it too well; she has given me some little things that wasn’t charged to me, but I think nearly everything I got there was charged to me, and it was deducted from that \$75 I was to get every quarter.

“Q. Was everything that you bought at the store charged against you? A. Very near all, except what she gave me.

“Q. What was the nature of the things that she gave you? A. She gave me one very fine lace waist that she made out of her old one, and that I appreciated very much, and she gave me some two or three little things.

“Q. I want you to tell the court just what she has given you as near as you can remember? A. She has given me some very nice things. I don’t remember, not many, but we were always exchanging presents between us; she gave me a very nice coat in St. Louis, and I was very proud of it, and which I still have; and

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she paid my hotel bill once or twice, and several little things.

"Q. What has she done towards paying your house rent and your grocery bills and clothing here in Bowling Green? A. She paid one month's rent, and she moved me off the farm.

"Q. And that's all she paid? A. Yes, sir."

Appellant's grounds for reversal when reduced to their last analysis are as follows:

1st. The contract of April 28, 1909, should be cancelled because unconscionable, unsupported by an adequate consideration and was procured by false representations.

2nd. If the contract is not to be cancelled yet it should not be enforced because:

a. Of want of mutuality.

b. It is too indefinite to be enforced by a court of equity.

c. The Forgeys have failed to perform the same.

d. The power of sale if valid could only be exercised by the joint action of Mr. and Mrs. Forgey whereas Mr. Forgey alone contracted for the sale to Jacobs.

These propositions will be discussed in their order.

I. It is contended that the contract set forth in the foregoing statement should be cancelled because it is an unconscionable contract, unsupported by an adequate consideration and was procured by

Cancellation
of Contract
Asked for
Fraud, etc.

false representations. In supporting this point, appellant contends that for the small outlay of \$300 annually during the remainder of Mrs. Gilbirds life, the For-

geys obtained from Mrs. Gilbirds the rents and profits from this large tract of land during the lifetime of Mrs. Gilbirds and upon her death the remainder in fee to become vested in Mrs. Forgey. A careful review of

the evidence, however, discloses that the above is not an accurate statement of the situation either with reference to what was surrendered by Mrs. Gilbirds or with reference to what was surrendered by the Forgeys as consideration for the agreement. The defect in the statement is that it assumes that prior to the agreement Mrs. Gilbirds was the owner of the fee simple title to said land and further assumes that the sole consideration coming from the Forgeys was the annual payment of \$300.

The contract of April 28, 1909, between Mrs. Gilbirds and the Forgeys and the deed of even date from Morrow, as trustee, to Mrs. Gilbirds and Mrs. Forgey must be considered in the light that they were parts of one transaction, because they were both executed as the final adjustment of the unfortunate condition of affairs existing between all the parties owning, or claiming to own, an interest in the land (excepting, of course, the mortgagees); and in determining the question of adequacy of consideration the situation should first be viewed with reference to the conditions existing prior to said final adjustment. Turning to the evidence in this regard, we find that, at that time, Mrs. Gilbirds instead of owning the fee simple title to the land (as appellant would seem to assume), owned only an equitable life estate in that portion of the land remaining after sufficient of the land should be sold to satisfy the existing encumbrances; the legal title, together with the right to possession of the land and to collect the rents and profits, was in Mr. Morrow, as trustee, and the equitable fee simple estate in remainder was in Noel Gilbirds and wife as tenants in common. In addition to this an outstanding cloud upon the title existed by reason of an appeal having been taken by Mrs. Forgey from the decree in the partition suit, by which decree the title had been divested from the heirs of John Gilbirds (one of whom was Mrs. Forgey) and vested in Mrs. Gilbirds. In that situation,

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conveyance of any of the property was deadlocked; interest was accumulating on the encumbrances; Mrs. Gilbirds was receiving no income whatever from the land, and foreclosures under the mortgages were imminent. By virtue of the general adjustment which culminated in the contract in question the Forgeys agreed to and did dismiss the appeal in the partition suit above referred to and agreed to join in the conveyances, thereby clearing the way to make title to the land, so that, for the purpose of satisfying the encumbrances, portions of the land could be sold at private sale and the hazard of sacrifice incident to sale under foreclosure be avoided; Mr. Forgey advanced the sum of \$1250 with which to satisfy certain claims against Mrs. Gilbirds which were mentioned in the deed to Morrow, trustee; Mrs. Gilbirds retained her life estate the same as before and in addition thereto the contract provided that in the event Mrs. Gilbirds should survive Mrs. Forgey the remainder in fee should thereupon vest in her, otherwise to be in Mrs. Forgey. By said contract the Forgeys became the lessees of the land for the rental of \$300 per year, the lease to terminate upon the death of Mrs. Forgey, if Mrs. Gilbirds was then living. The Forgeys further agreed to pay all taxes, insurance on buildings, and to keep the premises in repair. As will be noticed from the statement of facts set forth above, the average annual income remaining in the hands of the Forgeys after payment of the rental and interest was approximately the sum of \$225, out of which they were obligated to pay the taxes and insurance, and to keep the premises in repair. What these additional items would total does not appear, but the amount remaining would certainly be very small. The contract further undertook to vest in Mr. and Mrs. Forgey the power which had just prior thereto been vested in Morrow, trustee, to-wit, the power to make contracts for the sale of sufficient of said lands to pay off the existing encumbrances.

Appellant contends, however, that the appeal taken from the decree in the partition suit was not taken in good faith but that said appeal was without merit and was taken for the purpose of harassing appellant and unfairly coercing her to sign the contract. If this were true, it would undoubtedly so color the transaction with fraud and unfair dealing as to cause a court of equity to give relief. But the contention must fail because it is not supported by the evidence. It is true, no doubt, that the right of appeal exercised by Mrs. Forgey did exert a strong influence in producing the contract in question. As much is conceded by respondents. But this does not prove that the appeal was without merit or that it was impelled by bad faith. This, because an appeal in good faith and upon meritorious grounds would also produce that result. The record in the present case is silent with reference to the merits or demerits of Mrs. Forgey's rights under the then pending litigation, and we are therefore unable to say that it was without merit and promoted in bad faith.

With reference to the claim of false representations, the testimony of both Mrs. Forgey and Mrs. Gilbirds was, in substance, that before the contract was signed Mrs. Gilbirds objected to the contract on the ground that the \$300 provided for her was not sufficient to keep her and that Mrs. Forgey stated that the \$300 was only a matter of form and that she would see that her mother was amply provided for. From aught that appears in the evidence, there is nothing to show but that this promise was made in good faith. The daughter admits that she made the promise and insists that she has carried out that promise and has helped her mother all that she would permit. Mrs. Gilbirds does not claim that her daughter has *refused* in any particular to live up to that promise but admits that her daughter has given her some outside aid. She further admits that the daughter asked her to make her home with the daughter and her husband at

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Paynesville, which she did for several weeks, and that afterwards Mr. Forgey offered her the use of a residence property at Paynesville and offered to move her furniture there so that she might keep her own home, but this offer she refused. The main fault that Mrs. Gilbirds found with the Forgeys, with regard to the failure of her daughter to furnish her outside aid, appears to arise from the fact that some small articles which she purchased at Mr. Forgey's store were charged to her and that Mr. Forgey kept the amount of the bill out of her rent money. The evidence does not disclose what these items were. Neither does the evidence disclose that these were called to the attention of Mrs. Forgey and that she refused to pay them. It is true that there were differences arising between the parties after this contract was signed, but upon a careful review of the testimony, the impression prevails that these conflicts were the result of a personal dislike which Mrs. Gilbirds entertained for Mr. Forgey, rather than because of a failure upon the part of Mrs. Forgey to supply Mrs. Gilbirds with necessary additional support.

We have painstakingly read the entire evidence in this case and have carefully considered all suggestions of counsel in their briefs, and while the writer is free to admit that upon first impression we were inclined to look with suspicion upon the entire transaction, because of the peculiar relationship of the parties, yet upon the ascertainment of the true situation, as disclosed by the entire record before us, we have no hesitancy in saying that the action of the court was proper in refusing to decree a cancellation of the contract.

II. Was the decree of the court proper in directing specific performance? Upon due consideration, we have reached the conclusion that this question must be

**Specific
Performance:
Mutuality:
Definiteness.**

answered in the affirmative. In insisting that the court erred in this regard, appellant, in one portion of her brief, handles the question on the theory that the written contract of April 28th is the only written document upon which the prayer for specific performance is based, and in another portion of her brief considers the question from the viewpoint that the contract between the Forgeys and respondent Jacobs is the sole contract sought to be enforced. Neither hypothesis is correct. Both contracts are to be considered together in determining that question. Respondent's theory is that Mrs. Gilbirds, by her contract of April 28th, authorized and empowered the Forgeys to make a contract of sale of the land, for the purpose of reducing or satisfying the existing encumbrance, and that in exercising the power thus given they entered into the contract with Jacobs, which, when read in connection with the contract of April 28th, obligated Mrs. Gilbirds to join in the conveyance and obligated Jacobs to purchase the land. That portion of the contract of April 28th giving the Forgeys the power to make contracts for the sale of the land was as follows:

"It is further understood and agreed that the parties of the second part shall have the right to sell all or any portion of said premises either for the purpose of applying the proceeds of such sale or sales to the discharge of the remaining encumbrances against said premises or for the purposes of reinvesting, and the said party of the first part agrees to join in all necessary deeds to carry out such contract of sales as may be negotiated by said parties of the second part, it being the desire and intention of all of the parties to this instrument that so much of the real estate which shall be conveyed back to Mary V. Gilbirds by the said Morrow shall be sold as soon as practicable and on the best terms obtainable in order that the encumbrance which remains against said lands shall be paid off and dis-

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charged to the end that whatever remains of said lands, the title to which shall be in said Mary V. Gilbirds and Sarah J. Forgey, as above stated, may be free and clear of encumbrance."

The above clause undoubtedly constituted the Forgeys the agents of Mrs. Gilbirds to make contracts for the sale of the land with power to fix the price of the land. The only words that in any manner undertake to limit their power to fix the sale price are the words expressing that it was the desire and intention of the parties that the land should be sold "as soon as practicable and on the best terms obtainable." The evidence shows that the price for which the Forgeys agreed to sell the land to Jacobs was the best offer they had, after having the property on the market for several weeks, and it would appear from the evidence that said price was fair and reasonable and was the best price obtainable under the circumstances. The Forgeys acting for themselves with reference to the interest which they personally had in the land and as the agents for Mrs. Gilbirds, with reference to her interest therein, entered into the written contract of sale with respondent Jacobs. The terms of the contract with Jacobs definitely fixed the price and correctly described the land to be sold. Under those circumstances, a contractual relation arose which would give respondents the right to insist that Mrs. Gilbirds perform her written agreement to join in the conveyance. The rule is well settled that specific performance may be en-

forced either by or against an undisclosed principal when his duly authorized agent, in his own name, within the scope of his agency, contracts concerning the sale or purchase of the land. [Pomeroy on Contracts (2 Ed.), sec. 89, and notes; *Kelly v. Thuey*, 143 Mo. 422, 1. c. 438; *Randolph v. Wheeler*, 182 Mo. 145, 1. c. 154-155.]

In view of the above rule, the contention of appellant that Mrs. Gilbirds could not have enforced the

contract against respondents, and that the relief sought must fail for lack of mutuality in the contract, cannot therefore be allowed.

The error of appellant's contention that the contract is too indefinite, because it does not fix the price at which the land shall be sold, arises from the fact that she looks only at the clause of the contract of April 28th giving the agents the power to sell, instead of looking at the consummated act of her agents, the written contract with Jacobs, which does definitely fix the price and terms of sale.

It is further contended that the contract should not be enforced because the Forgeys have not performed their part of the contract of April 28th. In this regard appellant contends that by said contract the Forgeys obligated themselves to pay off the encumbrances out of their own means. This is based upon that clause of the contract which reads: "The said parties of the second part in consideration of the premises *hereinafter mentioned* agree to obligate themselves to pay off and discharge the remaining encumbrances against said land remaining after such transfers so mentioned shall have been made, *under the conditions as hereinafter stated,*" etc. The italicised portions of the above quotation clearly show that the obligation to pay was not from their individual resources, but on the other hand expressly refer to the terms of the contract "hereinafter mentioned" and under the "conditions hereinafter mentioned," and it would indeed be a forced construction to give to said clause any greater effect than that they were bound to see that the moneys derived from the sale of portions of the land should be applied upon the encumbrances, or, at most, perhaps to obligate the Forgeys to prevent foreclosure of the property until sufficient of the land could be sold to satisfy the mortgages.

It is further contended that the power of sale in the Forgeys, if valid and binding, could only be exer-

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cised by both of them acting together and that whereas Mr. Forgey acting alone made the contract with Jacobs, Mrs. Gilbirds did not become bound thereby. In this contention, appellant overlooks the important fact of the written ratification of the contract by Mrs. Forgey before this suit was instituted. By her written ratification of the contract, it became the joint action of herself and husband and leaves the contention without sufficient ground upon which to stand.

The judgment is affirmed. *Roy, C.*, concurs.

PER CURIAM.—The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. All the judges concur, except *Faris, J.*, not sitting.

MARY ALICE HEINBACH, Appellant, v. JESSE HEINBACH et al.

Division Two, November 24, 1914.

1. **SUIT TO PROBATE WILL: Action at Law.** An action in the circuit court to probate in solemn form a will which has been rejected by the probate court is but a will contest, and is an action at law, and the appellate court will not interfere with the verdict of the jury on the ground that the preponderance of the evidence was that there was no unsoundness of mind producing testamentary incapacity, where there was substantial evidence that testator was of unsound mind.
2. ———: ———: **Substantial Testimony: Drunkenness.** Where there is testimony that testator was an old man and for many years had been an extreme drunkard; two physicians say he died of alcoholic dementia, one of them that his condition of dementia must have extended back to a period of time before the will was made; certain statements made by testator indicate that they were either the idle vaporings of intoxication or the result of mental hallucinations, and one son is wholly unaccounted for; and, on the other hand, another physician, with opportunity to know, testifies that he was not afflicted with senile or alcoholic dementia, and nine lay witnesses positively testify that he was of sound mind, the question of

his mental capacity to make a will is one for the jury; for the evidence being substantial, its very inconclusiveness requires the submission of that issue of fact to the triers of the fact, and their finding, if the instructions were proper and there was no error in the admission or rejection of evidence, is conclusive on the appellate court.

3. ———: **Interest of Witness: Attorney: Contract of Employment.** The interest of any witness in the outcome of a suit may always be shown for the purpose of affecting the credibility of his testimony; but where the witness has admitted that he is an attorney in the case, and has been asked to assist in the trial by the attorney who has a contract of employment by some of contestants for a contingent interest in the property if the will is rejected, it is not prejudicial to the sole proponent to reject as evidence such contract, since it in nowise bears on the issue of testator's incapacity and the interest of the witness is sufficiently shown.
4. **DEPOSITION: Absent from Record.** The court will not hold that it was error to refuse the offer of a deposition in evidence if it has not been copied into the record.
5. ———: **Copy.** It is not error to refuse to permit a carbon copy of a deposition to be offered in evidence, if it shows unexplained interlineations, and there is no showing that the original has been lost and no inquiry has been made of the proper custodian, and no effort made to supply it in the way provided by statute.
6. ———: **Identity of Deponent.** If counsel on both sides and the court knew that deponent was too ill to appear at the trial and was the same person whom the carbon copy of the deposition indicates to be the deponent, and there was no objection to offering it in evidence on the ground of failure to identify, the refusal of the trial court to permit the carbon copy to be read in evidence on the sole ground of failure to identify could not be excused on appeal.
7. ———: **Whereabouts of Deponent.** Where the deposition shows that deponent resides in the county and within ten miles of the place of trial, it is necessary, as a condition precedent to the admission of the deposition in evidence, that the party offering it show some one of the conditions prescribed by Sec. 6411, R. S. 1909.
8. ———: ———: **How Shown: By Subpoena.** A subpoena properly issued by the clerk and a *non est* return thereon, are not alone a sufficient showing that a resident deponent who resides within the county is without the State or gone to a greater distance within the State than forty miles from the

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place of trial, and therefore to authorize the reading of her deposition in evidence.

9. **WILL CONTEST: Definition of Incapacity.** An instruction which omits some of the elements of incapacity, and thereby prescribes less soundness of mind than the law requires, is not an error of which proponent can complain, since the error is one in her favor.
10. ———: **Instructions: Comment on Evidence: Capacity to Make Contract.** An instruction which picks out certain isolated acts of business transacted by testator and ignores others done wholly or partly by him, is an erroneous comment on the evidence. And an instruction that tells the jury that "notwithstanding he was able to transact some business, signing leases, giving checks and receipts, yet unless the jury find from the evidence he possessed a mind and memory sufficiently clear and unimpaired to take into consideration all his property," etc., and ignores other business acts shown by the evidence to have been transacted by him during the time he is said to have been afflicted with senile and alcoholic dementia, such as the purchase of a house, the purchase of a piano on a contract of time-payment by installments, and the execution of divers dramshop bonds, is such an instruction. Nor is it held that a specific mention of all these business acts would have cured the unwarranted mentioning of some of them. The effect of the instruction was to tell the jury that all these business acts went for naught in the scale of sanity, unless the jury went further and found that he "possessed a mind and memory sufficiently clear and unimpaired to take into consideration all his property," etc.; and in effect told the jury that though testator may have been mentally capable of making a contract, it did not follow that he was capable of making a will; and in a close case, is reversible error.
11. ———: **Incapacity: Numerous Definitions.** Numerous instructions defining testamentary incapacity should not be given. Different and dissimilar definitions are misleading.

Appeal from Ralls Circuit Court.—*Hon. William T. Ragland*, Judge.

REVERSED AND REMANDED.

Charles E. Rendlen and *Frederick W. Neeper* for appellant.

(1) It has uniformly been held by this court that it is its province to examine the record of the evidence

in a will case to see if there is any substantial evidence to support the verdict or authorize the submission of the cause to the jury. *Winn v. Grier*, 217 Mo. 447; *Archambault v. Blanchard*, 198 Mo. 425; *McFadin v. Catron*, 138 Mo. 227; *Hamon v. Hamon*, 180 Mo. 685; *Crossan v. Crossan*, 169 Mo. 631. There is no substantial evidence in the record tending in the slightest degree to prove that Samuel Heinbach on Sept. 27, 1909, was not of sound mind and disposing memory. (2) It requires evidence of probative force that at the very time of the execution of the will, testator was not of sound mind and disposing memory. *Winn v. Grier*, 217 Mo. 450; *Von DeVeld v. Judy*, 143 Mo. 363. (3) Facts which occurred at the time of execution of the will including its provisions speak for themselves and clearly show testator knew what he was about at the time, what property he owned, what disposition he desired to make of it, all persons who came within range of his bounty. This makes sufficient showing of qualifications of mind to make a will, and refutes contention that Heinbach was insane when he executed it. The face of the will shows competency. *Crowson v. Crowson*, 172 Mo. 700; *Winn v. Grier*, 217 Mo. 450; *Wood v. Carpenter*, 166 Mo. 487; *Martin v. Bowdern*, 158 Mo. 390. (4) The test of a testator's competency to make a will is, that the testator understood the business about which he was engaged when he had his will prepared and executed, knew the persons who were the natural objects of his bounty, and understood his relations to them, and knew what property he had and the disposition he desired to make of it. This court has always been careful in preventing juries attempting to make wills for men. It has repeatedly set aside their verdicts. Measured by the following cases this will must be sustained: *Von DeVeld v. Judy*, 143 Mo. 348; *Cash v. Lust*, 142 Mo. 630; *Sehr v. Linderman*, 153 Mo. 276; *Winn v. Grier*, 217 Mo. 420; *Jackson v. Hardin*, 83 Mo. 175; *Riley v. Sherwood*, 144 Mo. 355; *Riggin v.*

Westminster College, 160 Mo. 570; Couch v. Gentry, 113 Mo. 248; Wood v. Carpenter, 166 Mo. 487; Kirschman v. Scott, 166 Mo. 214; Crowson v. Crowson, 172 Mo. 691; Maddox v. Maddox, 114 Mo. 47; Hamon v. Hamon, 180 Mo. 685; Sayre v. Trustees, 192 Mo. 95; Archambault v. Blanchard, 198 Mo. 384; McFadin v. Catron, 120 Mo. 253; Hughes v. Rader, 160 Mo. 579. (5) A man may be capable of making a will and yet be incapable of making a contract or managing his estate. Maddox v. Maddox, 114 Mo. 35; Crowson v. Crowson, 172 Mo. 702. (6) (a) There is no substantial evidence in the record showing incapacity at the time the will was executed. There is conflict of "opinions" but the opinions of unsoundness were predicated on state of facts that do not show incompetency. The "opinions" amount to nothing and give no force to such facts. Winn v. Grier, 217 Mo. 449; Wood v. Carpenter, 166 Mo. 487; Crowson v. Crowson, 172 Mo. 700; Sehr v. Lindemann, 153 Mo. 288. (b) The law requires something more than mere indefinite generalities to destroy or overbalance the presumption of sanity. McFadin v. Catron, 138 Mo. 197; Riggin v. Westminster College, 160 Mo. 570. (7) Testimony by subscribing witness against the validity of a will is looked on with suspicion. His testimony deserves to be discredited. Southworth v. Southworth, 173 Mo. 74; Hughes v. Rader, 183 Mo. 702; Mays v. Mays, 114 Mo. 541. (8) James O. Allison, and through him Jack Briscoe, had a direct pecuniary interest at the time in having the will denied probate, they had an interest in the devolution of the estate and in the probate of the will that determined the devolution of the estate. At common law under this contract as grantee therein he could contest the validity of the will and defeat plaintiff's title. The exclusion of Allison's contract for a six-tenths interest was prejudicial error. Watson v. Anderson, 146 Mo. 333; Sec. 555, R. S. 1909; Teckenbrocke v. McLaugh-

lin, 246 Mo. 719. (9) Instruction 3 given by the court at the request of respondents was erroneous. It in fact told the jury that even though testator was able to transact business of the character and the only kind in which he was engaged yet the jury might find testator incompetent. It commented on the evidence and denied probative force to the facts upon which any opinions worthy of consideration could be predicated; and the only proper criteria which the jury could properly consider in determining whether testator rationally acted. These facts were for the consideration of the jury alone with the other evidence, in determining the issue of fact; and the instruction attempts to pre-judge these matters which, if taken out of the case, would leave the mere negative opinions of witnesses, not predicated on substantial facts, to determine their verdict. This instruction was calculated to mislead and unduly influence the jury. *Benjamin v. Met. St. Ry.*, 50 Mo. App. 602; *Drug Co. v. McMahan*, 50 Mo. App. 18; *Railroad v. Stock Yards*, 120 Mo. 541; *McFadin v. Catron*, 120 Mo. 274.

J. O. Allison, Jack Briscoe, H. Clay Heather and Charles T. Hays for respondents.

(1) The real purpose of appellant's contention that the court erred in excluding evidence of the contract of senior counsel for defendants pertaining to his contingent fee, will not escape the court. Such contentions are sometimes made before a jury, but rarely in an appellate court. The counsel was not asserting any rights of his own and was not a party to the suit. Suffice it to say that the attorney's contract could not have any relevancy to the issue of testator's sanity. (2) Instruction 3 was not an adverse comment. Neither does it tell the jury what weight to give any of the evidence. *Coats v. Lynch*, 152 Mo. 161; *Gordon v. Burris*, 153 Mo. 223; *Holton v. Cochran*,

208 Mo. 418; Goodfellow v. Shannon, 197 Mo. 279. A similar instruction was before this court and was not criticised by court or counsel. Archambault v. Blanchard, 198 Mo. 422; Holton v. Cochran, 208 Mo. 419; Tilbe v. Kamp, 154 Mo. 575. (3) (a) It may be conceded that it is the province of this court to examine the evidence to determine whether there is any substantial evidence to sustain the verdict, but not to weigh the evidence. That rule obtains in will contests as in all other cases at law. Bensberg v. Washington University, 251 Mo. 641; Wendling v. Bowden, 252 Mo. 647; State ex rel. v. Guinotte, 156 Mo. 520. (b) The rule is that the burden is upon the proponents of the will to show that the testator was of sound mind, and such proof is a requisite of their prima-facie case, although, it seems, they may be aided by proof introduced by contestants. Bensberg v. Washington University, 251 Mo. 641. (c) The facts showed neither testamentary purpose nor capacity, and, with the inequality mentioned, must impress the just mind with a conviction against the will. Wendling v. Bowden, 252 Mo. 688; Hardy v. Sullens, 46 Mo. 152; Meier v. Buchter, 197 Mo. 86; Mowry v. Norman, 223 Mo. 463; Bensberg v. Washington University, 251 Mo. 654. (d) With respect to appellant's point wherein she would discredit the testimony of the subscribing witnesses, it is to be noted that they were plaintiff's witnesses. The facts here are entirely different from those in the cases cited by appellant, particularly Hughes v. Rader, 183 Mo. 700. (4) This will contest is a law case and the verdict of the jury, being based upon substantial evidence, must stand. The evidence is not only substantial but well nigh conclusive against the will. The testator was a confirmed drunkard for more than twenty-five years of the latter end of his life. For several years during the close of his life he suffered from alcoholic dementia and finally died of that disease. The disease was progressive in its nature and effects, the

testator was possessed of hallucinations and delusions. His body was enfeebled and his mind practically gone when he attempted to make the will. He had, several years before, given up attending to his business. He realized and expressed his inability to look after his business affairs. He had become oblivious to obligations of morals and of blood. His alleged will was unreasonable, unequal, unfair and unjust in its provisions. *Buford v. Gruber*, 223 Mo. 231; *Crum v. Crum*, 231 Mo. 626; *Bensberg v. Washington U.*, 251 Mo. 647; *Knapp v. Trust Co.*, 199 Mo. 640; *Cowan v. Shaver*, 197 Mo. 203; *Mowry v. Norman*, 223 Mo. 463; *Meier v. Buchter*, 197 Mo. 68; *Holton v. Cochran*, 208 Mo. 314; *Roberts v. Bartlett*, 190 Mo. 680; *Benoist v. Murrin*, 58 Mo. 307; *Hardy v. Sullens*, 46 Mo. 147.

FARIS, J.—This is a proceeding under the statute to probate, in solemn form, the will of one Samuel Heinbach, deceased. The plaintiff is the widow and (except for merely nominal bequests to decedent's three children) the sole devisee under the alleged will. The defendants Jesse Heinbach, Naomi Summers and Edith Britton are the children and heirs at law of deceased, and William F. True is the administrator of the estate of deceased.

Samuel Heinbach made the alleged will in controversy on September 27, 1909, and died in Ralls county, Missouri, on January 3, 1910. When the paper writing in controversy (hereinafter for brevity we beg the question and call said paper a will, and designate Samuel Heinbach as the testator) was presented to the judge of the Ralls County Probate Court, it was rejected and probate thereof refused. Thereupon the plaintiff brought this action in the circuit court of said county, and being cast therein, appealed to this court.

The petition was in the usual form; no point turns either upon its form or contents; so we need not cumber the record with it.

The answer, after admitting the formal allegations of heirship of defendants, the death of testator, the rejection of the will by the probate court, and the appointment of defendant True as administrator, averred as affirmative defenses, lack of testamentary capacity in testator, arising from an unsound mind, superinduced by old age and the excessive use of intoxicants, and that the said will was the result of undue influence exerted upon testator's mind in its alleged weakened state. But there was no sufficient proof adduced upon the latter point, so the learned judge *nisi* properly took this phase of the case from the jury, and thus it falls out of the case.

In the view which we are forced to take of the case, it will not become necessary to set out in detail the facts shown by the testimony of each of the several witnesses. The record is voluminous, containing as it does, over six hundred pages, and so we shall here content us with a sort of shorthand sketch of the salient facts in the case.

Samuel Heinbach, the testator, was a native of Indiana, where he married in 1872. Nine years later he abandoned his wife and children, of the latter of whom there seems then to have been two living, and came to Pike county, Illinois. Here at a point on the Mississippi River, about opposite the present village of Ilasco, he located himself and began to cut cordwood and do other work in the timber for a livelihood. One period of reconciliation with his first wife and family is shown, but whether this occurred within the nine years prior to 1881 or subsequent thereto and between the latter date and 1885, is dark and obscure in the record. There are both evidence and inferences in the record supporting either view. Likewise, it may be said in passing, there is some vague but hardly credible support for the view that his wife and family deserted him. But neither point is directly in issue or necessary to be ruled on. We but refer to it in fairness.

When the final separation occurred (the date whereof is upon the whole record exceedingly obscure), testator returned to the eastern banks of the Mississippi River, leaving his wife and young family in an indigent and poverty-stricken condition, and again took up his labors as a wood-chopper and a worker in the forests. For many years he lived with one Theodore Johnson and kept "batch," as the witnesses express it in the vernacular. About 1888 testator moved across the Mississippi River to a point in Ralls county some three miles south of Hannibal, Missouri. There he and Johnson had purchased together as tenants in common a tract of land containing some fifty-two acres. Johnson married about 1887 and went to live on this land, and verbal partition (subsequently consummated by mutual conveyances before this cause of action arose) between him and testator of this land seems to have been had, after which testator lived alone on his twenty-six-acre tract, subsisting by the cultivation of his land as a truck-farm and the sale of vegetables and produce therefrom.

In 1901 a large factory for the manufacture of Portland cement was constructed on a tract of 1800 acres of land near, or immediately adjacent to, the said land of testator. Testators' land thereupon came into demand as building sites for the houses of employees at this cement factory, and for sites for shops and stores, so that a small village, called Ilasco, grew up thereon. This land is the bone of contention here, forming as it does practically the whole estate of testator.

When testator and Johnson purchased the land in 1887, they paid only some ten dollars per acre for it, but when this case was tried the value of testator's part of it was laid at from \$12,000 to \$15,000.

Shortly after the construction of the cement factory testator began to lease building lots (pursuant to a rough plat made by Jack Briscoe, then his agent, now

of counsel for defendants) on the basis, as a rule, of what the witnesses style "ground-rent" of one dollar per lot per month. There were something over a hundred of these leased lots (to be exact, 106) held by testator's tenants upon leases running from their several dates for ten, fifteen, twenty and twenty-five years, the ground-rent from which had for several years been bringing testator an annual gross income of from \$1065 to \$1120.

From about the middle of September, 1905, down to the date of testator's death, he had an agent (at first, and from September or October, 1905, to October, 1906, said Briscoe, and thereafter till his death, one H. F. Fleurdelis), who collected his rents and for the most part prepared his leases and receipts, or, to be more exact, filled in the blanks therein, as both the receipts and the leases (for the major part) were upon printed blanks. But seven out of some fifty-six leases are shown by the proof as having been made prior to October, 1905, and presumably therefore by testator himself. In 1906 the latter procured by default a divorce from his first wife on the ground of desertion. This wife had then ten years before remarried, apparently without the prior formality of procuring a divorce from testator.

Testator, as far back as the witnesses are able to recall, was intemperate, and this condition grew on him with the years and after dramshops became plentiful and liquor more convenient at Ilasco. Touching the fact of his excessive use of strong drink the witnesses are practically unanimous, differing for the most part only in the degree of sottishness which they attribute to him. Some of them say that in thirty years' acquaintance with him they never saw him wholly from under the influence of intoxicants; still others say that he was the worst drunkard they had ever known; others yet, on the contrary, say they have sometimes seen him sober, once for a period of two

weeks, continuously. Two physicians, one of them his family physician, say that he died of alcoholic dementia. One of these, testifying largely from the history of his case and partially hypothetically, says that this condition of dementia must have existed for as much as a year before his death, and it therefore included the time at which the will was made. *Per contra*, another physician, who had formerly likewise long been his physician, and with opportunities equal to any other witness in the case to know and observe his condition, swears that he was not a senile or alcoholic dement, but was of sound mind.

Nine lay witnesses swear positively that testator was sane; while five for the defendants are equally positive that he was not of sound mind. Some, at least of the latter, had reasons fairly well founded for the opinions they expressed.

Plaintiff prior to her marriage to testator was a widow of mature age; the relict of one Scott, sometime recorder of Pike county. Her marriage to testator was but a little over nine months old when the will was made and but a year had elapsed when testator departed this life.

The charge of undue influence properly fell out of the case for lack of proof to sustain it and we need not follow it further. Plaintiff, it may be said in passing, was, so far as the record before us shows, uniformly kind and attentive to testator, omitting for his care and comfort no wifely duty, though his filthy drunken condition often rendered the performance of these duties peculiarly onerous and revolting. Testator, as the proofs shows, fully appreciated plaintiff's care and attention, and spoke of her uniformly with much love and kindness.

Testator talked loosely, possibly drunkenly, of the condition and financial states of his children. Many things he said of them as to their station in life and their comfortable situations were apparently false;

but whether these statements were but the drunken, idle vaporings of intoxication, or whether they were the results of mental hallucinations, is utterly dark from the record. His son Jesse is wholly unaccounted for and whether, except for the purposes of this particular action, he be living or dead, we cannot ascertain from this record, though the showing is made that he had been absent, unheard of, for nineteen years when the case was tried. It is of sentimental value only and in nowise pertinent to or decisive of the legal questions herein involved that testator's children, the defendants here, made no greater effort to find him (till he was dead) and aid and comfort him than he, on his part, made to find and assist them. Any, the least, effort on either side would indubitably have resulted in discovering the whereabouts of the other side.

Upon the trial of the case the court gave, among other instructions asked by defendants, this one, to-wit:

“Notwithstanding the jury may believe from the evidence that Samuel Heinbach was able to transact some business, signing leases, giving checks, receipts, yet unless the jury believe and find from the evidence that at the time of the execution of said alleged will, said Samuel Heinbach possessed a mind and memory sufficiently clear and unimpaired to take into consideration all his property, and the persons who had a natural and reasonable claim on his bounty, if any, and the disposition he desired to make of his property, then he did not have sufficient capacity to make a will and the verdict of the jury must be against said will.”

The jury by their verdict found that the paper writing in controversy was not the last will of decedent and plaintiff has appealed in due form.

Other facts, if such shall become necessary, will be found set forth in the opinion.

I. Counsel for plaintiff in the assignment of errors in their brief set out thirteen different reasons why the judgment below should be reversed. Coming to a critical examination of them we conclude that in all fairness and clarity these alleged errors may all be considered under four heads; more especially so since, for what seems to us fatal error, we are forced to reverse and remand the case. So, we shall discuss these assignments under four heads, which include all points briefed.

The first contention made is, that there is no sufficient evidence of unsoundness of mind producing testamentary incapacity to take the case to the jury. We will consider briefly whether this is so.

Incapacity of Testator: Sufficient Evidence. The rule is now well and abundantly settled that a will contest (and this action though technically an action under our statute to probate a rejected will in solemn form, is yet in the last analysis but a will contest) is an action at law and the rule that as an appellate court we may not interfere where there is substantial evidence to sustain the verdict of the triers of fact, prevails and concludes us. [Roberts v. Bartlett, 190 Mo. l. c. 695; McFadin v. Catron, 138 Mo. l. c. 227; Naylor v. McRuer, 248 Mo. l. c. 458; Hill v. Boyd, 199 Mo. l. c. 448; Turner v. Anderson, 236 Mo. 523; Knapp v. Trust Co., 199 Mo. l. c. 663.]

In the case of Naylor v. McRuer, supra, Division Two of this court, quoting largely from Roberts v. Bartlett, supra, said:

“As a court of errors in a case of law, as a contest of a will case under our statute is, we are not required to pass upon the credibility of the witnesses and the weight of the evidence, if the evidence be substantial; these considerations are relegated to the triers of fact.

“This doctrine is said in Roberts v. Bartlett, 190 Mo. l. c. 695, to be well settled in this State. In this behalf the language of GANTR, J., in the case above

cited, is pertinent: 'The rule of practice is well settled in this State, that a will contest is an action at law, and this court will not reverse the judgment because the jury found against the weight of the evidence, but that this court will examine the record to see if there is any testimony to support the finding, and where there is no evidence whereon to base the verdict, the judgment will be reversed. [State ex rel. v. Guinotte, 156 Mo. 1. c. 520, 521; McFadin v. Catron, 138 Mo. 227.]' "

When we have recourse to this rule in the instant case we see that there was adduced substantial evidence of testator's testamentary incapacity. We have in the statement of the case briefly referred to the number of witnesses who testified for and against his sanity, and also briefly to the general trend of their testimony. The learned court *nisi* was right in taking from the jury the issue of undue influence, and he was also right in refusing to take from the jury the question of testamentary capacity. Since the case, however, must be reversed and remanded for other reasons below set out, we will not here cumber the books or hamper a retrial with a resume of the evidence. Suffice it to say, that while the testimony in our view was by no means conclusive or satisfying on the question of the soundness or unsoundness of testator's mind, it yet being substantial, and partially by reason of this very inconclusiveness, made out a case to be resolved upon proper instructions by the triers of fact alone. We disallow this point then, and say that if upon another trial the testimony as to lack of mental capacity to make a will shall prove as strong as that in the record before us, the case should be left to the jury upon this question.

II. Counsel for plaintiff made most strenuous efforts to put in evidence the written contracts of employment made between defendants Edith Britton and

Interest of
Witness:
Attorney's
Contract of
Employment.

Naomi Summers of the one part and one of defendants' counsel upon the other. The court below refused to allow these contracts of retainer to go to the jury, upon the theory, it may be, that however much light these instruments might or might not throw upon the defendants' state of mind, they were of no probative weight in determining whether testator was sane or insane at the time he made the will in controversy.

It is urged by plaintiff's learned counsel that these contracts ought to have been admitted in evidence for the reason that Mr. Jack Briscoe, one of the attorneys for defendants, was a witness in the case, and since his testimony shows that his services were procured by Mr. J. O. Allison, also of counsel, and the one with whom the contracts were made, the contents of these contracts would thus show the interest of the witness Briscoe in the result of the action.

The record shows that Mr. Briscoe had no contract based upon the contingency of recovery. In fact, he denied having any contract with anyone, but testified he was assisting as counsel because Mr. J. O. Allison told him he wanted him (Briscoe) to assist in the matter. Previous to the answer of Briscoe last above, he had answered, when inquiry was made as to whether he had any interest in the controversy, that he was "an attorney in the case." It is too plain for discussion that the contents of the contracts offered could throw no light upon the issue before the court. This issue was *devisavit vel non* and it turned wholly upon the mental condition of testator on the 27th day of September, 1909. The contracts were not made till January, 1910. Likewise in the light of the facts as shown by the testimony of Mr. Briscoe, since (he says and it is not denied) he had no contingent contract with either the defendants or Mr. Allison, but was merely in the case because Mr. Allison had asked him to assist in the

matter (inferably, upon an implied agreement that Allison should requite him upon *quantum meruit*), how could the contents of the contracts of defendants with Mr. Allison, whether the same were fair or unconscionable, affect the testimony of Briscoe? He had already said in effect that he was an interested witness, because he had admitted he was an attorney in the case. Without his admitting interest the jury would have known he was an interested witness from the observed fact that he was of counsel. Conceding that as a general rule the interest of any given witness in the outcome of a case, or the bias or prejudice of such witness for or against either party litigant, may always be shown for the purpose of affecting the credibility of such witness (3 Chamberlayne on Ev., sec. 1785; State v. Miles, 199 Mo. l. c. 546), it is yet fairly clear that under the facts here the rejected evidence was at most cumulative upon the point of the interest in the case of Briscoe who, electing to become a witness as well as counsel, admitted an interest in the result of the case, which interest the jury would have noticed without his admission. The contents of these contracts had no other relevancy to this case outside of the exceedingly dim light they cast in a far-fetched way upon Briscoe's admitted interest herein. Since this interest was frankly admitted and since, even if it had been denied, the jury doubtless would have observed it, and known of it, and weighed it, nevertheless, and since it is not only good business but good human nature for a lawyer to feel an interest in the result of the cases in which he or she is counsel, we are not disposed to say that the court erred in refusing to permit these contracts to be offered in evidence. So far as we are able to see the only effect of the contents of these contracts upon the jury would have been to bias their judgment by prejudicial means. In passing, and looking by and large to the whole record in this case, we are constrained to say that had half as much effort been made

upon the trial to frankly develop the actual facts as was made to inject hurtful prejudice into the minds of the jury, we might possibly have been able to ascertain from the record the real condition of the testator's mind and so might, perhaps, have been able to obviate a reversal of the case. As the record is we cannot conclude either way, and must needs reverse for error.

III. It is contended by plaintiff that the court should have permitted plaintiff to offer the copy of the deposition of one Mrs. Mary Smashey, since the record discloses that the witness Neil Smashey testified that his wife Mary was ill, under the care of a physician and unable to appear personally and

Depositions. testify. When learned counsel for plaintiff offered to read an alleged carbon copy of Mrs. Smashey's deposition he did not identify her as being the Mary Smashey who, the proof showed, was too ill to appear. But as this from the whole record clearly was known both to counsel on both sides and to the court and as no objection to the offering was made for failure to show identity, we would not be able to excuse the trial court's action on this ground alone. But since counsel have not seen fit to copy the refused deposition into the record, we are unable to say whether the refusal to admit it was error or not. We are not permitted to assume the existence of reversible error from the mere allegation of its existence; the law is that he who alleges error must prove error. Besides (and on this ground the action of the court *nisi* was entirely right), the record shows that counsel for plaintiff merely made profert of an alleged carbon copy of Mrs. Smashey's deposition, saying, in so offering such copy, that he was unable to find the original. Counsel for defendants objected to the offering of the copy of this deposition. Plaintiff's counsel expressed himself as being unable to state whether certain interlineations which he stated he found upon the carbon copy

had been made thereon by the witness, or made before the witness Mrs. Smashey signed this copy. Since there is no showing that the original deposition was lost, no inquiry having been made of the proper custodian thereof, and since no effort was made to supply this document as provided by statute (pretermittting the weightier and sufficient objection that this deposition is absent from the record), we hold that the court below was right in refusing to allow the alleged copy of the deposition to be offered.

Likewise, plaintiff contends that the court erred in refusing to admit in evidence the deposition of Mrs. Ola Gregory. In this the court was also right. No showing was made as to the whereabouts of Mrs. Gregory at the time her deposition was offered. Her deposition shows that she resided at Ilasco, which place the record abundantly shows is in Ralls county and only some ten miles or less distant from New London where the trial occurred. This being so, it was incumbent on plaintiff, as a condition precedent to the admission of this deposition, to first show some one of the conditions under which section 6411, Revised Statutes 1909, permits a deposition to be offered. This plaintiff did not do.

Some controversy arose as to an alleged *non est* return upon a subpoena for this witness. But neither such subpoena nor the sheriff's return thereon was offered. While under the statute we scarcely see the pertinency of this controversy, since it turned upon the question of whether a *non est* return (which was not offered) upon a subpoena (likewise not offered), the body of which may or may not have been written by counsel, but which was signed and sealed by the clerk (or his deputy), is a sufficient showing under section 6411, *supra*, to admit a deposition to be read without further proof of the absence of a resident witness from the State. We fail to see how it would be, or how the return on any subpoena, however written

or issued, would of itself alone be a sufficient showing under our statute. Here it was incumbent upon plaintiff as a condition precedent to the offering of the deposition of this resident witness, to show either that the witness was without the State, or, being within the State, that she had gone to a greater distance than forty miles from the place of trial, without the consent, connivance or collusion of plaintiff.

IV. The serious question in the case is the contention that instruction numbered three is erroneous. This instruction we set out *verbatim* in the statement of the case.

Appellant contends that said instruction three is a comment on the evidence and that it presents an erroneous definition of testamentary capacity. Taking the last objection first, and premitting
Instruction on Incapacity. for the moment the question of the alleged comment on the evidence, if any, in this instruction, as well as the question of how far such comment serves to render bad the attempted definition, we conclude that even if the definition of the sufficiency of the soundness of mind which is meet for will-making, falls short of that given in the books, yet plaintiff was not hurt by it. The lack of sufficiency or definition was here in her favor. Testator, even if we concede all that plaintiff says of it, was by this instruction allowed to make a will though his mind lacked some of the elements of soundness—some of the tests prescribed in the adjudged cases. [Turner v. Anderson, 236 Mo. l. c. 544; Crum v. Crum, 231 Mo. l. c. 638; Holton v. Cochran, 208 Mo. 314; Roberts v. Bartlett, 190 Mo. l. c. 699; Naylor v. McRuer, 248 Mo. l. c. 462.] So, if the test of mental capacity as prescribed by this instruction fell so far short of being correct as to be erroneous, the error was clearly one in plaintiff's favor and she is in no position to complain. [Naylor v. McRuer, 248 Mo. l. c. 463.] She was upholding the will.

If the instruction permitted testator to make a valid will while possessing less soundness of mind than the law allowed, plaintiff was not hurt and so she may not complain. This is what we said in the case of *Naylor v. McRuer*, *supra*, while there approving the definition of mental capacity commensurate with testamentary capacity at set out in *Turner v. Anderson*, 236 Mo. l. c. 544. So much for the criticism of the definition of testamentary capacity as found in said instruction three.

But the point that this instruction is a comment upon the evidence, we think is well taken. Besides, two other criticisms may well be lodged against it. It picks out but three isolated items of business shown by the proof to have been transacted by testator and ignores other contracts made largely or wholly by him, to-wit, the purchase of a house and lot from Dr. Tutt, and the purchase of a piano on a contract of time-payment by installments, as also other business papers executed, to-wit, divers dramshop bonds. All these things are shown by the proof to have been done by testator within the period during which Dr. Detweiler says he was a senile dement. We are not holding that such specific mention of all of the business acts of testator would have cured this instruction. We may be permitted to doubt this. This fact does, however, lend much color to the charge that the instruction comments upon the evidence.

Its effect is to utterly destroy with the jury whatever probative force exists in favor of sanity, and arising from the proven facts that testator did the several acts and items of business which we mention and also those which the instruction recites. Plaintiff was entitled to the full benefit of this proof. But this instruction says to the jury that even though testator was able to transact the business mentioned, all these acts went for naught in the scale of sanity, unless the jury went further and found that he "possessed a mind and memory sufficiently clear and unimpaired to take into con-

sideration all his property, and the persons who had a natural and reasonable claim on his bounty, if any, and the disposition he desired to make of his property." Both the letter and the spirit of this instruction are opposed to the well-settled rule of law in this State that a man may be mentally capable of making a will when he is mentally incapable to make a contract. [Brinkman v. Rueggessick, 71 Mo. 553; Crossan v. Crossan, 169 Mo. 640; Giboney v. Foster, 230 Mo. l. c. 134; Knapp v. Trust Co., 199 Mo. l. c. 663; Roberts v. Bartlett, 190 Mo. l. c. 696; Hamon v. Hamon, 180 Mo. 685; Crowson v. Crowson, 172 Mo. l. c. 702.] This instruction tells the jury in effect that though the testator might have been mentally capable of making a contract it did not follow that he was mentally capable of making a will. It may not have followed in truth, either as a medical or a legal corollary, but plaintiff in so doubtful and dark a case as this was entitled to have the jury consider all of the acts of business testator did in connection with all other facts and circumstances of the case in order to throw light upon the questions of whether when he made his will be understood he was doing so; whether he understood the nature and extent of his property; whether he knew all persons who reasonably came within his bounty and who were the natural objects thereof; whether he understood to whom he desired to give his property and to whom he was giving it and whether he was able without the aid of others to retain these facts in mind long enough to make his will.

We feel no manner of doubt as to the error in this instruction and need not pursue this inquiry further. The case of Archambault v. Blanchard, 198 Mo. l. c. 422, where, we are told an almost identical instruction was given, is called to our attention. We find that such an instruction practically identical with this one was given in the above case and that neither counsel nor this court criticised it. But even a casual reading

of that case shows that this instruction (numbered 8, and appearing on page 422 of the reported case) was never approved either expressly or impliedly; for after the instructions were set out in the statement of the case, none of them was ever afterwards mentioned in the opinion, and the case was reversed and remanded with directions to probate the will, because there was not sufficient evidence to take the case to the jury. It therefore never became necessary to mention this instruction. But it is peculiarly unfortunate that this instruction should have been set out in the statement of the Archambault case, as the doing so may well have misled, as it undoubtedly did here mislead, both counsel for defendants and the learned trial court in this case.

Since for this error this case must be retried, we may here say that instruction two for defendants seems a correct and fair statement of the law. [Turner v. Anderson, 236 Mo. l. c. 544; Naylor v. McRuer, 248 Mo. l. c. 462; Crum v. Crum, 231 Mo. l. c. 638; Holton v. Cochran, 208 Mo. l. c. 410; Goodfellow v. Shannon, 197 Mo. l. c. 280; Knapp v. Trust Co., 199 Mo. l. c. 663; Hamon v. Hamon, 180 Mo. l. c. 701; Current v. Current, 244 Mo. l. c. 437; Farmer v. Farmer, 129 Mo. l. c. 538.] We see no reason for defendants asking three instructions, however, each defining testamentary capacity in different terms. If it should become necessary, and counsel are so advised, to refer more than once to the definition of testamentary capacity, it would simplify matters to refer aptly to the definition already given. However, if such reference does not suffice, at least three dissimilar, and therefore, to an extent misleading definitions, should not be given. One should be selected and adhered to.

For the reasons set out the case should be reversed and remanded, to be retried in accordance with these views. Let this be done.

Walker, P. J., and Brown, J., concur.

CITY OF SPRINGFIELD v. SARAH R. OWEN,
Appellant.

Division Two, November 24, 1914.

1. **CONDEMNATION: Cities of Third Class: Notice: Appeal.** Where in a proceeding by a city of the third class to condemn land to widen a street the owner was served with summons, filed answer, and contested to judgment, the proceeding as to him will not be held invalid on his appeal because the record shows that the notice by publication to those owning land within the benefit district was defective.
2. ———: ———: **Compensation: Appeal.** Where the evidence in a condemnation proceeding was conflicting, some of the witnesses fixing defendant's benefits as equal to the value of the land taken, others fixing the amount approximately at that allowed by the jury, and still others fixing it higher, the Supreme Court cannot say that the compensation was grossly inadequate and therefore it will not interfere with the verdict.
3. **INSTRUCTIONS REFUSED: Points Already Covered: Appeal.** An appellant cannot complain because of the refusal of his instructions upon points covered by like instructions given by the court.
4. **FIXING BENEFIT DISTRICT: Legislative Function: City Council.** The making of a benefit district is a legislative function delegated to the city council in cities of the third class. In executing this power the municipality may exercise a broad discretion, and, absent fraud, arbitrary action or demonstrable mistake, the courts will not interfere.
5. ———: **Property Outside City Limits: Orders of Circuit Court.** Where only the property to the north of a proposed improvement in a city of the third class was included in the benefit district fixed by the city council, that to the south being when the district was fixed outside the city limits, Sec. 9266, R. S. 1909, providing that after the filing of exceptions to the commissioners' report the court "shall thereupon make such order as right and justice may require, and may make a new appraisalment on good cause shown," does not vest the circuit court with authority to make a new benefit district and include land to the south, even though that land has in the meantime been brought within the city limits.

6. **OBJECTIONS TO EVIDENCE: Must be Specific.** To avail upon appeal an objection to the introduction of evidence must be specific. The remark, "Question objected to," will not suffice.

Appeal from Greene Circuit Court.—*Hon. Alfred Page, Judge.*

AFFIRMED.

John P. McCammon for appellant.

(1) The motion to abate and dismiss the action should have been sustained. The statute requires publication for four weeks consecutively. R. S. 1909, sec. 9263. The affidavit made by the publisher was that the notice was published two times, "the first insertion on Dec. 11, 1909, second insertion Jan. 10, 1911." The court had no authority to appoint commissioners without the notice required by the statute having been given. R. S. 1909, sec. 9264. The giving of the notice in the manner prescribed "to all persons to whom it may concern" is just as essential to the jurisdiction of the court to proceed further as is the service of summons upon the owner of the land. The court "on being satisfied that due notice of such petition has been given"—not the service of summons upon the owner of the land merely—shall appoint, etc. The jurisdiction of the court—the power to take the citizen's property through "*strictissimi juris*"—cannot be satisfied with the notice shown by plaintiff and to which defendant called attention in her answer and in every paper filed, including, of course, the motion in arrest.

(2) The testimony will show that most of plaintiff's witnesses were very reluctant to acknowledge the value of defendant's land. But taking this testimony alone as to the value of lots, and averaging it, the value after deducting all the benefits assessed would be from \$1387 to \$1657.

(3) The court rejected material testimony

offered by defendant. The court permitted plaintiff to show that the taking of defendant's property would make a street of uniform width from the boulevard on east to Campbell street on the west, and refused to permit defendant to show that the street would not be of uniform width if opened. It permitted plaintiff to ask and witness to answer the question, "Would it be a very great advantage to have this platted that way and the south side of the addition to be up against a blind alley?" over the objection of defendant. The court refused to permit defendant to show that the property abutting on south side of the street would be benefited by the widening of the street as well as that on the north side. This was very material, for the reason, among others, that plaintiff's testimony showed that the way witnesses arrived at the benefits to defendant's land was by calculating the benefits to other property in the benefit district and subtracting that from the defendant's total damages, which left the amount \$518 to be charged against defendant as benefits. (4) The property south of Grand avenue should have been assessed with benefits, and the taxing of all benefits against the property of defendant, releasing that south of the street, is a violation of the constitutional guaranty against the taking of private property. *St. Joseph v. Crowther*, 142 Mo. 155. Plaintiff's testimony here showed greater benefit to the land south than to defendant's land, though the court would not permit defendant to inquire about it, and yet the benefits to that land were not permitted consideration by the jury. Defendant's land was made to bear the entire burden. That the south 17½ feet of the 30-foot street had been given by the owner of the land south of the street did not release that land from assessment for benefits. *City v. Wetzel*, 110 Mo. 260. Neither was this phase of the case affected by the fact that the land south of the street was taken into the city after the passage of the ordinance. The statute provides for just such an emer-

gency by adding the mandatory power, after the filing of exceptions to the report of the commissioners, that "the courts shall thereupon make such order as right and justice may require, and may order a new appraisal on good cause shown." R. S. 1909, sec. 9266.

Leonard Walker and Fred A. Moon for respondent.

(1) The first error assigned and the first point made by appellant is the alleged error of the trial court in overruling appellant's motion to dismiss the action on the ground that the notice of publication was not properly published. There are three complete answers to this point: (a) No such motion was made. Appellant's motion to dismiss does not contain a word about the insufficiency of the publication. The motion assigns other reasons entirely, which reasons seem now to be abandoned by counsel for appellant. A question not presented to the trial court will not be considered on appeal. *Freeland v. Williamson*, 220 Mo. 217; *Smith v. Railroad*, 137 Mo. App. 165; *Buxton v. Kroeger*, 219 Mo. 224; *Thomas v. Scott*, 221 Mo. 271; *Mosley v. Railroad*, 132 Mo. App. 649; *Storage Co. v. Kuhlman*, 238 Mo. 685. A party is restricted on appeal to the theory adopted at the trial. *Riggs v. Met. St. Ry. Co.*, 216 Mo. 304; *Mankze v. Goldenberg*, 149 Mo. App. 12. (b) Appellant cannot now be heard to complain of the insufficiency of the publication of the notice because that alleged error is not mentioned in her motion for a new trial. *Davidson v. Investment Co.*, 226 Mo. 1; *Sterrett v. Railroad*, 225 Mo. 99; *Murphy v. Railroad*, 228 Mo. 56; *Jackson v. Burgess*, 143 Mo. App. 438. Now for the first time appellant calls attention to that alleged error in overruling the motion to dismiss. Having neither mentioned it in the motion to dismiss nor mentioned it in the motion for new trial, she cannot be heard to assign that as error here.

(c) Appellant is in no position to complain of the insufficiency of the publication because she answered and went to trial and filed her exceptions to the commissioners' report, and then tried the case before a jury. She can hardly be in a position to say she did not know the case was pending. If other persons are effected by the assessment of benefits, which seems to be the case, they are the only ones who can complain. The appellant's benefits would be neither more nor less by the failure to acquire jurisdiction over other persons against whom the benefits were assessed. However, the trial court found the publication was entirely sufficient. (2) The third point made by appellant is an argument upon the evidence. Appellant purports to set out the testimony of two witnesses as to the value of the ground taken. It is not correctly nor fairly done. The main facts testified to are ignored. The point, however, is that appellant, after finding from the testimony of these two witnesses that the value of the ground taken was from fifteen to twenty-seven hundred dollars, then decides off-hand that that is absolute proof of the value, and the only deduction therefrom should be \$518, benefits, which would leave from one thousand to twenty-one hundred dollars as the proper verdict in the case. Where does appellant get this \$518 benefits? How does counsel for appellant know that the jury found that the property was benefited only \$518? Where is there anything in the record or in the verdict indicating that? It is true that the commissioners reported that amount as benefits, but appellant did not agree to stand by the report of the commissioners; on the contrary, appellant repudiated the report of the commissioners, filed exceptions to it and claimed that it was entirely erroneous and preferred to submit the entire matter to a jury. Appellant wants to stand by the commissioners' estimated benefits and refuses to stand by its estimated damages. The two have to go together. Having filed exceptions,

the matter was tried before a jury and the jury was instructed to assess the benefits and the damages and return a verdict for the difference, so that the jury, and not counsel for appellant, had the duty to find out how much the property was benefited. Accordingly if counsel's resume of the evidence as to the amount of damages is correct, it must be presumed that the jury found the benefits were only \$300 less than the damages, or from fifteen to twenty-four hundred dollars. Besides the two witnesses, whose testimony appellant attempts to present in her brief in such a way as to show it most favorable to her, were two of the commissioners who assessed her benefits and damages, and they testify squarely in support of the finding of the commissioners in every particular. (3) It was not material to a proper determination of the case whether the proposed street would be of a uniform width of 60 feet or 80 feet in width. The city council had full power to lay out the width of the street in any way it saw proper, and its action is final. It had the sole power to describe the benefit district and to declare all of the land within the district to be deemed benefited. Secs. 9261, 9262, 9263, 9264, 9265, R. S. 1909. The property abutting on the south side of Grand avenue was not within the benefit district as prescribed by ordinance of the city council. The commissioners had the plat showing the benefited district before them when they made up their findings of benefits and damages, and so did the jury that finally passed on the question of benefits and damages and neither of them even considered the land south of Grand avenue because the land south of the street was in the county not even in the city limits at the time the finding of the commissioners was filed March 5, 1910, and for that reason it could not have possibly influenced their findings either way. (4) There was no error in the re-

fusal of an instruction asked by the appellant because the jury was sufficiently advised in the instruction given on the court's own motion, that they were not to consider any benefits or damages that might accrue to land lying immediately south of the land sought to be taken.

WILLIAMS, C.—In this suit the city of Springfield, a city of the third class, seeks, by the exercise of the right of eminent domain, to condemn a strip of land belonging to defendant, for the purpose of widening a street known as Grand avenue in said city. The strip of land sought to be condemned is 30 feet in width and approximately 1320 feet in length, containing approximately ten-elevenths of an acre of land and is located along the south edge of a tract of farm land owned by defendant. As the time of the passage of the ordinance providing for the condemnation of this land and the fixing of the benefit district, and also at the time this suit was instituted in the circuit court, the southern limits of said city ran along the south edge of Grand avenue at this place. The benefit district, as fixed by the ordinance, was confined to land north of Grand avenue, taking in a strip about 300 feet in width, including some of defendant's land, together with approximately 50 smaller tracts or lots belonging to other persons. The affidavit of the publisher making proof of the publication of the notice required by section 9263, Revised Statutes 1909, was as follows:

“State of Missouri,

“County of Greene.

“H. S. Jewell, being duly sworn according to law, says that he is publisher of the Springfield Leader, a daily newspaper printed and published in the county of Greene, State aforesaid, and that the notice here-

unto annexed was published in said paper for — weeks consecutively as follows:

“First insertion 11th day of December, 1909.

“Second insertion 10th day of January, 1910.

“H. S. JEWELL, Publisher”

And duly sworn to.

Defendant was served with summons and appeared and filed answer and also motion to dismiss the action. Later the circuit court appointed three commissioners to assess the benefits and damages in the cause. Said commissioners made report finding the value of the land taken to be \$880 and her benefits to be \$518. And also assessed benefits against 50 tracts of land owned by other persons, at from \$2 to \$15 each, totaling \$282. Defendant filed exceptions to the commissioners' report and later a trial was had in the circuit court, before a jury, resulting in a judgment in favor of the defendant for the sum of \$300. Thereupon defendant duly perfected an appeal to this court.

I. It is contended by appellant that the circuit court was without jurisdiction to try this cause for the reason that the record shows that the
Condemnation: notice required by section 9263, Revised
City of
Third Class: Statutes 1909, “to all persons to whom it
Notice. may concern” was published only twice, whereas the statute requires that said notice be published for “four weeks consecutively.” In support of this contention, appellant cites authorities holding that only by strict compliance with the statutory requirements can the right of eminent domain, a right purely statutory and in derogation of common law, be exercised.

That this rule of law is well settled in this State there can be no dispute. But does that rule of law aid appellant in the present case? In other words, does the above rule apply to the present facts? In this, as in the great majority of cases decided by ap-

pellate courts, the difficult task is not to determine or discover abstract principles of law but rather to determine what particular rule of law is evoked by the given facts. In the present case appellant, the only necessary party defendant to the condemnation proceedings, was duly served with summons, appeared and filed answer and contested in the circuit court every step of the proceedings upon the merits. And upon finding herself aggrieved by the result of said trial brings the case here for review and asks that the judgment be reversed and the cause remanded because the persons owning land in the benefit district were not notified as required by the statute.

A review of the authorities requiring strict compliance with the statute will, in nearly every instance, disclose that the irregularity held to be fatal to the validity of the proceedings was the failure to perform some statutory requirement which was an essential prerequisite to establish the court's right or authority to proceed against the right of the person *complaining* of such irregularity. Here we have no complaint from the persons for whose especial benefit the statutory requirement as to publication was made. If those persons were here raising the question that said statutory notice had not been given, and it should appear that they had not waived the want of notice by having generally appeared to the proceedings below (*City of Tarkio v. Clark*, 186 Mo. 285, l. c. 298), then it might well be said that as to that issue, to-wit, the issue concerning the assessment against them, there could be little doubt but that the assessment was void for the reason that failure of sufficient publication of the notice would leave the court without jurisdiction to adjudicate the matter. But that issue is not here presented. In the present case there can be no doubt but that the court acquired jurisdiction over the person of the appellant by the service of summons and also

by the further fact that appellant appeared and filed answer. We are also of the opinion that the court acquired jurisdiction of the subject-matter, when, after all necessary preliminary steps were properly taken by the city council, the condemnation petition, in due and proper form, was filed in the circuit court. And thus having jurisdiction over the subject-matter and over the person of the appellant, should the action of the court in dealing with that person and subject-matter be set aside because of irregularities which might withhold the jurisdiction of the court to proceed against the property of others? We think not. The proceeding to assess benefits against the property in the benefit district is in its nature collateral to the main issue having to do with the condemnation of appellant's land. It is collateral in that it does not affect in any manner the condemnation of the land which is the main branch of the litigation. Whether the assessment of benefits is void or valid, it cannot affect the rights of appellant, because appellant is to receive her compensation directly from the city and the city is not to acquire any title, nor even the possession of the condemned strip until it pays appellant the amount of compensation fixed by the court. [Sec. 9269, 9271, R. S. 1909; Art. 2, sec. 21, Constitution of Missouri.]

The great weight of authority is to the effect that in condemnation proceedings the general rule prevails that "the proceedings will be valid as to those having notice and invalid as to those not notified." [2 Lewis Eminent Domain, par. 586; Mills on Eminent Domain, par. 95; 1 Elliott on Roads and Streets, par. 358; Town of Tyrone v. Burns, 102 Minn. 318; Ross v. Board of Supervisors, 128 Iowa, 427, 1. c. 434.]

We do not undertake in any manner to say that the above general rule should be applied in all cases but leave that question open to be determined as the single instances may arise. However, we have no hesi-

tancy in saying that it should be applied where, as here, the issues involving the rights of those not notified do not in any manner involve or affect the rights of those duly notified.

II. It is further contended that the compensation **Compensation.** fixed by the jury was grossly inadequate. With reference to this point, it is sufficient to say that the evidence was conflicting. Some of the witnesses testified that the benefits accruing to appellant by reason of the proposed improvement were equal to the value of the land taken. Other witnesses fixed the amount approximately as allowed by the jury. Others fixed the compensation higher. Under such conditions, we cannot say that the compensation allowed was grossly inadequate and therefore will not interfere with the amount allowed by the jury. [St. Louis v. Calhoun, 222 Mo. 44, l. c. 55, and cases therein cited.]

III. It is contended that the court erred in refusing defendant's instruction which in- **Instructions.** formed the jury that if they "should find that land south of Grand avenue abutting thereon is benefited by the opening or widening of the street they should not assess any of such benefits against the land of defendant."

Without passing upon the question as to whether or not under the evidence in this case appellant was entitled to the above instruction, it is a sufficient answer to appellant's contention to say that the court in an instruction given on its own motion did tell the jury, in effect, that benefits accruing to land south of the proposed improvement should not be considered by them in arriving at appellant's compensation.

IV. It is further contended that the property south of the proposed improvement should have been assessed with benefits and that the failure to assess such land made the benefits assessed against defendant's land higher than they otherwise would have been.

The property south of the proposed improvement was not included in the benefit district as defined by the city council, and therefore was not subject to assessment. Furthermore, at the time the city council fixed the benefit district, the land south of the proposed improvement was outside of the territorial limits of said city and it is difficult to conceive how it could have been lawfully included therein.

Appellant relies upon the case of *St. Joseph v. Crowther*, 142 Mo. 155. An examination of that case discloses the fact that the land which was not properly assessed with its just portion of the benefits was within the benefit district as fixed by the city council, and hence the case is not in point. Appellant contends, however, that since the land south of the improvement was later (the exact date is not given) brought into the city limits by enlargement of the city territory, section 9266, Revised Statutes 1909, "provides for just such an emergency by adding the mandatory power, after the filing of exceptions to the report of the commissioners, that 'the courts shall thereupon make such order as right and justice may require, and may order a new appraisalment on good cause shown.' " Just what order the court should have made in the present case, but failed to make, appellant does not undertake to say. But it is clearly apparent that said section does not vest the circuit court with power to make a new benefit district. That power, being a legislative function, is, by delegation of legislative authority,

Delegation of Legislative Powers to City Council. vested in the city council. [Sec. 9262, R. S. 1909.] In executing this power the municipality may exercise a broad discretion and, absent fraud, arbitrary action, or "demonstrable mistake," the courts will not interfere. [5 McQuillin, *Municipal Corporations*, par. 2052.] It is not contended that the benefit district in the present case was the result of any of the above-named invalidating agencies.

V. It is contended that the court erred: (a) in refusing to permit defendant to show that the street when widened would not be of "uniform width;" (b) in permitting plaintiff to ask and witness to answer, over the objection of defendant, the question, "Would it be a very great advantage to have this platted that way and the south side of the addition to be up against a blind alley?"

Upon an examination of the record as to point a, we find that the court did permit defendant to show that a portion of Grand avenue was 80 feet in width and that at the place where it was proposed to be widened it would be 60 feet. From those facts the jury could readily discover that the street would not be of uniform width.

With reference to point b, the record discloses that when the question was asked, defendant's **Objections to Evidence.** counsel said: "Question objected to." The court overruled the objection and defendant saved an exception. The above objection failed to specify the ground of objection and therefore raised no point for appellate review. [Williams v. Williams, 259 Mo. 242, and cases therein cited.]

The judgment is affirmed. *Roy, C.*, concurs.

PER CURIAM.—The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. All the judges concur.

THE STATE v. CLARENCE WALLS, Appellant.

Division Two, November 24, 1914.

1. **COINDICTEE: Testifying Without Objection.** An assignment that a co-indictee was used as a witness against defendant before a *nolle prosequi* had been entered cannot be considered on appeal, if no objection was interposed to his competency when he was offered as a witness. No objection to the competency of a witness can be considered on appeal not raised at the proper time in the trial court.
2. **INSTRUCTIONS: Stealing Chickens: Definition of Grand Larceny.** An instruction defining grand larceny which omits the fact that the chickens must have been taken in the nighttime to have constituted grand larceny, is immaterial and harmless, if the words "grand larceny" do not appear in any other instruction, and the jury were not required to find the defendant guilty of grand larceny, and the only issue under the evidence was whether defendant stole the chickens, and that issue was presented in a proper instruction.
3. **CONVICTION: On Evidence of Accomplice.** A defendant may be convicted of stealing chickens in the nighttime upon the testimony of an accomplice.

Appeal from Macon Circuit Court.—*Hon. Nat. M.
Shelton*, Judge.

AFFIRMED.

Lacy & Shelton for appellant.

(1) The defendant's demurrer to the State's evidence should have been sustained and the defendant discharged. R. S. 1909, sec. 5231; *State v. Clark*, 147 Mo. 36; *State v. Anslinger*, 171 Mo. 600. (2) Instruction number 1 given on behalf of the State, defining grand larceny, is not applicable to this case; is misleading, prejudicial to the defendant and not a correct definition of the offense charged. The facts in evidence do not justify this instruction. *State v. El-*

sey, 201 Mo. 571; State v. Gordon, 191 Mo. 114; State v. Walker, 196 Mo. 85; State v. Chambers, 87 Mo. 409; State v. Evans, 124 Mo. 410; State v. Matthews, 148 Mo. 185. (3) Instruction number 3 given on behalf of the State is not predicated on the facts evolved at the trial. There is no evidence in the record that the defendant "alone" did steal, take and carry away, etc., any chickens. State v. Hargraves, 188 Mo. 337. (4) Refused instruction B requested by the defendant was sufficient to call the attention of the court to the incompetency of the witness Zust to testify in the case, while jointly charged in the information with the defendant and neither discharged nor found guilty. In view of the fact that the witness Zust was jointly charged in the same information with the defendant, this instruction should have been given. State v. Chyo Chiagk, 92 Mo. 395; State v. Weaver, 165 Mo. 12. (5) The court failed to instruct the jury on the good character of the defendant, as required by statute, although defendant had placed his character in issue and introduced several witnesses who testified it was good for honesty and fair dealing and a law-abiding citizen. R. S. 1909, sec. 5231; State v. Anslinger, 171 Mo. 600; State v. Clark, 147 Mo. 36. (6) As to the material elements of the offense, the conviction of the defendant is based solely upon the evidence of the witness Zust. The record and the evidence show that at the time he testified he stood jointly charged in the same information (which is shown by the record in this case) with the defendant, and by the same information upon which the defendant was tried and convicted. So that by statute and the law of this State Zust was absolutely incompetent as a witness to testify against the defendant. The conviction of defendant rests solely upon the evidence of an incompetent witness. R. S. 1909, sec. 5241; State v. Chyo Chiagk, 92 Mo. 395; State v. Weaver, 165 Mo. 12.

John T. Barker, Attorney-General, and *Shrader P. Howell* for the State.

(1) The demurrer to the evidence filed by defendant at the close of the State's case was properly denied. There had been substantial evidence offered on every necessary element to constitute the crime charged. Furthermore, this assignment of error is not before this court for review, for the reason that defendant failed to stand upon the demurrer but offered testimony in his defense, thereby waiving his rights under the instruction asked. (2) The direct testimony of the co-indictee and participant in the crime, if true, showed conclusively that the defendant was guilty as charged, and this testimony was corroborated by strong circumstantial evidence. Under our statute, if one by his presence at the scene of crime lends encouragement to its perpetration and is in a position and willing to render assistance if necessary to the active participant, he is in contemplation of law equally guilty with the one who physically consummates the criminal act. *State v. Orrick*, 106 Mo. 120; *State v. Kennedy*, 177 Mo. 131; *State v. Nelson*, 98 Mo. 414; 1 *Wharton's Criminal Law*, sec. 211a. The common design or purpose to commit the criminal act need not be shown by direct and positive evidence, it may be deduced by attending circumstances connected with the transaction in question. *State v. Walker*, 98 Mo. 104; *State v. Sykes*, 191 Mo. 78; *State v. Spaugh*, 200 Mo. 591; *State v. Fields*, 234 Mo. 623. (3) It is not necessary to frame an instruction with the technical precision of an information. The purpose of an instruction is to serve as a guide to a jury composed of average, plain men and to assist them to a correct understanding of the law as applied to the facts of the particular case which they are called upon to determine. Under that principle of construction instruction number one when considered in connection with

the implied meaning of the words used therein, will be found sufficient. *State v. Richmond*, 228 Mo. 365; *State v. DeWitt*, 152 Mo. 85; *State v. Campbell*, 108 Mo. 611; *State v. Gray*, 37 Mo. 464; *State v. Sasseeen*, 75 Mo. App. 201; *State v. Moore*, 101 Mo. 326. Moreover, it is a well-established rule that instructions given on the trial of a case are to be taken together as constituting one whole, and if, when read together, they correctly announce the law applicable to the case, they are sufficient. Applying that test to the instructions given, it will be found that instruction number one, as amplified and explained by instruction number three, fairly stated the law of grand larceny as applicable to this case. *State v. Matthews*, 98 Mo. 130; *State v. Riney*, 137 Mo. 105; *State v. Dunn*, 221 Mo. 530; *State v. Hall*, 228 Mo. 456; *State v. Montgomery*, 230 Mo. 660. Instruction number three is an accurate statement of the constitutive elements of the crime charged as defined in the statute and contained in the information. It sets out the facts necessary to constitute the offense of grand larceny under section 4537. Sec. 4537, R. S. 1909; *State v. Lawson*, 239 Mo. 600; *State v. Alexander*, 184 Mo. 273. (4) Instruction B was correctly and fully covered by the first instruction given by the court at defendant's request. The court, therefore, did not err in refusing the instructions asked. *State v. Crittenden*, 191 Mo. 23; *State v. Edwards*, 203 Mo. 545; *State v. Carpenter*, 216 Mo. 448; *State v. Green*, 229 Mo. 655; *State v. Diple*, 242 Mo. 480; *State v. Connors*, 245 Mo. 481; *State v. Butler*, 247 Mo. 699. (5) At the time the instructions on behalf of the State were given the defendant neither requested an instruction on good character nor excepted to the failure of the court to so instruct. No exception was entered at the time the instructions were given nor was the failure of the court to instruct on good character in any manner referred to in the motion for a new trial, other than by the general and indefinite allegation that the "court

failed to instruct on all the law of the case." An allegation such as is contained in the motion for a new trial in the case at bar is insufficient to preserve the alleged error for review here. Sec. 5285, R. S. 1909; State v. Douglass, 258 Mo. 281; State v. Sydnor, 253 Mo. 380; State v. Conway, 241 Mo. 291; State v. Sykes, 248 Mo. 712; State v. Horton, 247 Mo. 663; State v. Dockery, 243 Mo. 599; State v. Chissell, 245 Mo. 555; State v. Connors, 245 Mo. 482; State v. Bostwick, 245 Mo. 483; State v. Harris, 245 Mo. 450; State v. Wellman, 253 Mo. 316; State v. Gaultney, 242 Mo. 391; State v. Stevens, 242 Mo. 439; State v. Fisher, 162 Mo. 172; State v. Kimmell, 156 Mo. App. 472. (6) The incompetency of a witness cannot be raised for the first time in this court. Kelly's Crim. L. and Pr., sec. 263; State v. Crab, 121 Mo. 564; State v. Witherspoon, 231 Mo. 724; State v. Whitsett, 232 Mo. 526.

BROWN, J.—Convicted of stealing chickens in the nighttime, as denounced by section 4537, Revised Statutes 1909, and his punishment fixed by a jury at two years in the penitentiary, defendant appeals.

Defendant and one Glen Zust, his hired hand, were jointly charged with stealing thirty-one chickens from one Sherman Sutton in Macon county, Missouri, in June, 1913.

The conviction, in a large measure, rests upon the evidence of Glen Zust, who testified that he went with defendant at about the hour of midnight to a point within one-eighth of a mile of the home of Sutton, where defendant remained with some sacks while Zust went to Sutton's henhouse and stole the chickens, one by one, and carried them to defendant, who placed them in sacks and took them to his home. Zust testified that three separate trips were made and between twelve and sixteen chickens stolen from Sutton by him and defendant on each trip, and that a few days later defendant took the chickens to the near-by towns of

Callao and New Cambria and sold them. Witness Zust further stated that his feelings toward defendant were unkind, because defendant struck him and refused to pay his wages.

Prosecuting witness Sutton testified to missing a good many chickens in June, 1913, and to the further fact that defendant raised no chickens. Two merchants, one from Callao and the other from New Cambria, testified that they bought chickens from defendant in June, 1913, about thirty altogether, and produced some of the checks which were issued in payment for the chickens.

Defendant, testifying in his own behalf, denied the theft, but admitted that he raised no chickens and that he sold chickens as testified to by the merchants. His defense was that he obtained from his father the chickens which he sold in Callao and New Cambria. On this point he was corroborated by the evidence of his father.

In rebuttal, four of defendant's neighbors testified that his reputation for veracity was bad, and a similar number that his reputation for honesty and fair dealing was likewise bad. Two others testified that they did not know anything derogatory of defendant's reputation.

The alleged errors relied upon for reversal will be noted in connection with the conclusions we have reached.

OPINION.

I. One of the alleged errors relied upon for reversal is the fact that Glen Zust, who occupied the position of a co-indictee of defendant, was used as a witness for the State at a time when the charge against him had not been nolle prossed. In support of this assignment defendant cites *State v. Chyo Chiagk*, 92 Mo. 395, and

**Witness:
Competency of.**

State v. Weaver, 165 Mo. 1, l. c. 12. This assignment is not open to defendant here because no objection was interposed to the incompetency of said witness Zust when he was offered by the State. This precise point was expressly ruled adversely to the insistence of defendant in the case of State v. Crab, 121 Mo. 554, l. c. 563-4. [See, also, State v. Whitsett, 232 Mo. l. c. 526.] As we do not try criminal cases *de novo*, no objection to the competency of a witness can be considered here which was not raised below at the proper time. If defendant had objected when Zust was offered as a witness the court could have removed his alleged disability by dismissing the charge as to him. [Sec. 5241, R. S. 1909.] It would be grossly unfair to the prosecution to allow the defendant to remain silent when the law required him to speak, and then on appeal permit him to profit by his own nonaction. This assignment is ruled against defendant.

II. Complaint is made against instruction number 1, given on the part of the State, which reads as follows:

“Grand larceny, as used in these instructions, is the unlawfully, wrongfully and feloniously taking of another’s property with the wrongful, Instruction. fraudulent and felonious intent to deprive the owner thereof and to make it his own property.”

This instruction is assailed on the ground that it is not a correct definition of the offense charged against defendant, and is misleading and prejudicial. It is true that the definition of grand larceny contained in said instruction omits the fact that the chickens must have been taken in the nighttime to constitute grand larceny. It is difficult, however, to see how this instruction could have misled the jury, for the reason that the words “grand larceny” do not appear in any other instruction given in this cause. The instruction

under consideration was only intended as a definition or guide to the jury to ascertain the meaning of the words "grand larceny," which the court evidently thought it would thereafter use in other instructions in this cause, but which words it did not subsequently use, and did not need to use. Therefore, said instruction became meaningless as a guide to the jury in this cause. If, under the evidence, there was a controversy or doubt as to whether defendant took the chickens from witness Sutton under some claim of right, then instruction number 1 might have proven harmful, but such an issue is not in the record. Under the evidence defendant either stole the chickens, or he did not get them from Sutton at all.

The third instruction given on the part of the State reads as follows:

"The jury are instructed that if they believe from the evidence beyond a reasonable doubt the defendant, Clarence Walls, either alone or in company with one Zust, did feloniously in the nighttime, on or about the 9th day of June, 1913, take, steal and carry away from the premises of Sherman Sutton, upon which his dwelling house was situated,—chickens, the property of Sherman Sutton, you will find the defendant guilty as charged and assess his punishment at imprisonment in the penitentiary for a term not exceeding five years nor less than two years, or by fine not exceeding two hundred dollars, or confinement in the county jail not exceeding two months, or by both such fine and imprisonment."

It will be seen that the last-quoted instruction tells the jury that the taking of the chickens must have occurred in the nighttime, and further informs them that such chickens must have been stolen to constitute the crime of which defendant was charged. We, therefore, hold that, when considered with instruction number 3, given in this case, instruction number 1 was a harmless error which was not prejudicial to the de-

fendant upon the merits. As no judgment should be reversed for errors that are only technical, we overrule this assignment. [State v. Richmond, 228 Mo. 362, l. c. 365.]

III. Defendant seems to be deeply grieved because he was convicted on the evidence of his accomplice Zust. However, the court gave the usual cautionary instruction to guide the jury in weighing the evidence of an accomplice, and this point is without merit. [State v. Sassaman, 214 Mo. 695, l. c. 729; State v. Bobbitt, 215 Mo. 10, l. c. 41; State v. Shaffer, 253 Mo. l. c. 335.]

IV. Other alleged errors relating to instructions given and refused are assigned by defendant, all of which we have carefully examined and find that they are either not preserved for review in the motion for new trial, or that they are so unimportant as not to merit special mention in our opinion. [State v. Conway, 241 Mo. 271; and State v. Douglas, 258 Mo. 281.]

There being no reversible error in the record we affirm the judgment.

Walker, P. J., concurs; *Faris, J.*, concurs in result.

THE STATE v. JAMES A. NICHOLS, Appellant.

Division Two, November 24, 1914.

1. **EXHIBITING DANGEROUS WEAPON:** "Exhibit:" Instructions. The word "exhibit" as used in an instruction defining the offense of exhibiting a dangerous weapon in a rude, angry, and threatening manner is not of technical import; it is a plain English word that needs no definition.

2. ———: Evidence: Question for Jury. Evidence in a trial for exhibiting a pistol in a rude, angry, and threatening manner in the presence of others held to justify a submission of the case to the jury.

Appeal from Stoddard Circuit Court.—*Hon. W. S. C. Walker*, Judge.

AFFIRMED.

J. L. Fort and *H. S. Green* for appellant.

John T. Barker, Attorney-General, and *Thomas J. Higgs*, Assistant Attorney-General, for the State.

WILLIAMS, C.—Upon an information charging him, under section 4496, Revised Statutes 1909, with the crime of having exhibited a dangerous weapon, to-wit, a pistol, in a rude, angry, and threatening manner in the presence of two persons named in the information, defendant was tried in the circuit court of Stoddard county, Missouri, found guilty, and his punishment assessed at a fine of \$100. Defendant duly perfected an appeal to this court.

Upon the part of the State the evidence tended to establish the following facts. Prosecuting witness Elsworth claimed that defendant owed him for labor. Accompanied by one Birchfield, Elsworth called upon defendant and requested that he pay the debt. After some controversy over the matter, defendant, while not denying the debt, said, "I will not pay you." Thereupon prosecuting witness, becoming angry, took a few steps toward defendant and defendant pulled from his shirt bosom a pistol and pointed it in the face of the prosecuting witness, causing him to stop. At this time Birchfield, who was seated a few feet away, on the other side of a fence, arose, and as he did so defendant pointed the pistol at him. During the time he was exhibiting the pistol in the above man-

ner defendant said, "I will kill both of you G— d— s— of b—s." After that the defendant walked away and there was no further difficulty. The evidence further tended to show that defendant offered prosecuting witness \$50 if he would come before the court and swear that he had made a false affidavit in causing defendant's arrest; and that defendant had made attempts to have the prosecuting witness leave the county and State until the term of court was over. The evidence offered on the part of the defendant tended to prove that he did not have a pistol with him at the time of the controversy and that he did not exhibit a pistol at that time and place and that he did not use the oath above mentioned. A complete abstract of the record has been filed in this court but appellant has failed to favor us with a brief in the case. Under our statutory duty, however, we will proceed to examine the record and discuss the points properly raised by the motion for new trial.

I. The defendant requested the court to further instruct the jury by defining the word "exhibit" as used in the instruction which required the jury to find that defendant "did wilfully and feloniously in the presence of James Birchfield and George Elsworth, *exhibit* in a rude, angry, and threatening manner, a certain dangerous and deadly weapon, to-wit, a pistol," etc. The court refused the request and defendant saved an exception and in his motion for new trial assigned the same as error. The court did not err in this regard. "Exhibit" as used in the instruction is a word, not of technical import, but one of plain English, well understood and commonly used. Such words need not be defined. [State v. Sattley, 131 Mo. 464, l. c. 491.]

II. It is contended that the evidence fails to prove the venue of the alleged offense. A review of the evi-

Venue. dence does not justify this assignment of error as will at once appear from the following quoted portion of the testimony of one of the State's witnesses, to wit:

"Q. Where did this [referring to the alleged offense] take place, Mr. Elsworth? A. It took place near where I were living on Mr. Nichols's farm.

"Q. What State and county? A. *State of Missouri; County of Stoddard.*"

III. It is further contended that the court erred in giving each of the instructions given on behalf of the State. No useful purpose would be subserved in a lengthy discussion of the respective instructions. We have carefully examined the same and find them to be free from error.

IV. It is contended that the evidence is insufficient to support the verdict. The evidence upon the part of the State tends to prove that defendant drew his revolver and pointed the same, first at Elsworth, and then at Birchfield, at the time saying, "I will kill both of you G—d—s— of b—s." This was sufficient evidence to justify the submission of the case to the triers of the facts. It is true that defendant denied having a revolver on that occasion and denied that he made the above stated threatening remarks. But that at most presented to the jury the problem of determining from the conflict of evidence the true facts of the matter, and under such circumstances the action of the jury is final.

**Evidence:
Question
for Jury.**

The judgment is affirmed. *Roy, C., concurs.*

PER CURIAM.—The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. All the judges concur.

THE STATE v. CLAUDE RADER, Appellant.

Division Two, November 24, 1914.

1. **LARCENY: Instruction: No Felonious Intent: Steal.** An instruction setting forth the elements of larceny, which omits the words "with a felonious intent," or words of equivalent meaning, is erroneous. At common law a felonious intent was a constituent element of larceny, and by statute the common law is in force in this State and is the only rule of decision until it has been abrogated or changed by statute, and for at least ninety years the statute concerning larceny has contained the words "feloniously steal, take and carry away," etc.
2. ———: ———: ———: **Words of Equivalent Meaning: Steal.** Larceny is an exception to the general rule, which is that the words "felonious" and "feloniously" need not be used in an instruction, and if used they need not be defined. An instruction for grand larceny ought to require the trial jury to find that the taking was with a felonious intent, but the specific use of the word "felonious" or "feloniously" is not absolutely necessary. Words of equivalent meaning may be used in stead; but the word "steal" is not an equivalent. *Held*, by WALKER, J., that where the instruction contains the words "unlawfully steal, take and carry away" the words "with felonious intent" are not only not necessary, but their use would be both redundant and tautological.
3. ———: ———: ———: **Accessory.** Defendant, while confined in calaboose for a misdemeanor, hired Bell to feed and attend to his horses kept in a barn. The feed running short, defendant directed Bell to go to a neighbor's barn and get corn and alfalfa. Bell did so, committing grand larceny, and concealed the articles in defendant's barn. Bell at first denied that defendant was connected with the larceny, but later confessed, and testified he stole the corn and alfalfa at defendant's direction and procurement; defendant testified that he directed Bell to buy the feed, not to steal it. The case is close upon its facts. *Held*, that defendant was entitled to a specific instruction requiring the jury to find that defendant, in the alleged procurement of said Bell to commit the larceny charged, acted with a felonious intent. An accessory before the fact must in all cases act with a criminal intent, and where the crime charged is grand larceny he must have acted with a felonious intent.
4. **INSTRUCTIONS: Assumption of Larceny: Accessory.** Where defendant is being tried as an accessory to a grand larceny

committed by Bell, and Bell swears he did steal the things charged, and defendant does not deny or controvert the theft, but denies his guilty connection therewith, it is not error for the State's instructions to assume that Bell stole the things.

Appeal from Boone Circuit Court.—*Hon. David H. Harris*, Judge.

REVERSED AND REMANDED.

N. T. Gentry for appellant.

(1) The State's instruction number 1 is erroneous, because: (a) It omits the all important part of the definition of larceny, to-wit the words "with a felonious intent." In case where the defendant was tried for stealing a steer, these words were termed "the chief ingredient of grand larceny," and a conviction was set aside on account of the failure to use said words in the State's instruction. *State v. Weatherman*, 202 Mo. 9. In another larceny case, it was said that "the felonious intent is the material ingredient of the offense." *State v. Gray*, 37 Mo. 463. In speaking of an instruction which omitted the felonious taking of the money alleged to have been stolen, and in reversing the case, this court said "Attention to the numerous adjudications of our own courts would prevent errors like this." *State v. Rutherford*, 152 Mo. 132; *State v. Richmond*, 228 Mo. 366; *State v. Casey*, 207 Mo. 11; 2 *Bishop's New Crim. Law*, sec. 811; *State v. Moore*, 101 Mo. 328; *State v. Storts*, 138 Mo. 137; *State v. Waghatter*, 177 Mo. 689; *State v. Gresser*, 19 Mo. 247; *State v. Campbell*, 108 Mo. 614. This has been the settled law of Missouri for seventy years past, ever since Judge Scott said, "To constitute this offense, therefore, in any form, there must be a taking from the possession, a carrying away against the will of the owner, and a felonious intent to convert it to the offender's use." *Witt v. State*, 9 Mo. 671; 3 *Chitty*,

675. It must also be remembered that our statute, in defining this crime, uses the words, "feloniously stealing, taking and carrying away." R. S. 1909, sec. 4535; 18 Am. & Eng. Ency. Law, 500, 502; Moore v. State, 166 S. W. (Tex. Cr. App.) 1153; 8 Ency. Ev. 122; State v. Zehnder, 228 Mo. 327; State v. Littrell, 170 Mo. 13; State v. Waller, 174 Mo. 518. (b) For the further reason that there was no evidence sufficient to justify the giving of an instruction on the subject of grand larceny. There was no evidence of the contents of the sacks that were taken by the witness Bell, neither was there any evidence of the value of the contents: and without the oats and ground alfalfa, the property was of a value less than thirty dollars. When there is no evidence of the value of the article alleged to have been stolen, it is error to instruct on the subject of grand larceny. R. S. 1909, sec. 4535; State v. Murphy, 141 Mo. 270; State v. Norman, 101 Mo. 524. (2) State's instruction number 2 is erroneous as it assumes that Bell did take the property of W. L. Green. An instruction in a criminal case should not assume a fact that it is necessary for the State to prove. State v. Ferguson, 221 Mo. 529; State v. Drew, 179 Mo. 324; State v. Bonner, 178 Mo. 432; State v. Marsh, 171 Mo. 529; State v. Hecox, 83 Mo. 538; State v. Dillihunt, 18 Mo. 331; State v. Wheeler, 79 Mo. 366; State v. Evans, 158 Mo. 606; State v. Bobbitt, 215 Mo. 43; State v. Vickers, 209 Mo. 33; State v. Langley, 248 Mo. 554. Instruction 2 is also erroneous in that it says "prior to the wrongful taking of the property of W. L. Green." It should have said "prior to the felonious taking, stealing and carrying away of the property of W. L. Green." The property might have been taken wrongfully by Bell, and yet not stolen, as defined by our criminal code. Authorities supra. "To prove the offense of the principal, it is necessary to establish not only his criminal acts that go to make up the felony, but also the criminal intention on his

part." 1 Ency. Evid. 73; People v. Collins, 53 Cal. 185; Walker v. State, 118 Ga. 758; State v. McKean, 36 Iowa, 343. Said instruction is further erroneous in that it says, that the jury must find that the defendant "counseled and advised with said Bell," and that he "solicited him to take the same." Even if Bell did take the property with a felonious intent, it was necessary for the State to prove, and for the jury to find, that the defendant feloniously aided, counseled and solicited him to do the taking. This important factor (the criminal intent) is entirely omitted from this instruction. State v. Branch, 237 Mo. 252. All of our authorities hold that a defendant, in order to be held liable for the acts of the accomplice, must have had the "felonious intent." State v. Shour, 196 Mo. 219; State v. Dalton, 27 Mo. 16; Wharton's Crim. Ev. (8 Ed.), sec. 440; State v. Kuhlman, 152 Mo. 103; State v. Umble, 115 Mo. 461; State v. Hollenscheit, 61 Mo. 308; State v. Stacy, 103 Mo. 13; R. S. 1909, sec. 4898; State v. Hayes, 105 Mo. 84; State v. Hang Tong, 115 Mo. 389; State v. Douglass, 44 Kan. 625. And finally, instruction 2 is erroneous because it assumes that defendant intended for Bell to take Mr. Green's property. The jury should have been required to find that, by the words, "If you will go out there, I am satisfied you can get some feed out there," the defendant intended for the witness Bell to feloniously steal said feed. The court should not have assumed, as it did by this instruction, that those words were either counsel, advice, encouragement or command to Bell to commit larceny. 1 Ency. Evid. 78; Hicks v. United States, 150 U. S. 449; State v. Hickam, 95 Mo. 322. (3) The trial court erred in not giving an instruction on the subject of petit larceny. The State's evidence showed that the witness Bell took some alfalfa, corn, oats, etc., and the witness Crump testified that, in his opinion, that amount of feed was worth \$33.30. But it must be remembered that he did not know the quantity of oats

in the eight sacks, and no other witness testified to the quantity. As there was no proof as to the amount contained in the eight sacks of oats, and as this is a criminal prosecution in which nothing can be taken by inference, the oats should be eliminated in the total valuation. *State v. Gabriel*, 88 Mo. 643; 1 Greenl. on Evidence (14 Ed.), sec. 6a; *State v. Narzinger*, 220 Mo. 53; *State v. Lingle*, 128 Mo. 540; *State v. Ruck*, 194 Mo. 430; *Hamilton v. People*, 113 Ill. 38; *State v. Shields*, 110 N. C. 497; R. S. 1909, sec. 4549; *State v. Norman*, 101 Mo. 524; *State v. Sharp*, 106 Mo. 109; *State v. Murphy*, 141 Mo. 270; 8 Ency. of Evid. 140; *Dubois v. State*, 20 Fla. 841; *State v. Wood*, 46 Iowa, 116; *Brooks v. State*, 28 Neb. 389; *People v. Kehoe*, 19 N. Y. Supp. 763. It is the duty of the trial court to instruct on all questions of law arising in the case, whether asked to do so or not. R. S. 1909, sec. 5231; *State v. Nicholas*, 222 Mo. 434.

John T. Barker, Attorney-General, and *Thomas J. Higgs*, Assistant Attorney-General, for the State.

(1) It is not necessary that an instruction be as broad as the charge in an indictment or information, and it is not essential that it contained the word "feloniously." The term "feloniously" is one of classification only and is therefore essential as a rule in the information, in order that the offense may be classified, but is not essential in the instruction. *State v. Helton*, 234 Mo. 557; *State v. Richmond*, 228 Mo. 362; *State v. Cummings*, 206 Mo. 613; *State v. Rowland*, 174 Mo. 373; *State v. Woodward*, 131 Mo. 369; *State v. Barton*, 142 Mo. 450; *State v. Miller*, 159 Mo. 113. It is not essential that an instruction on grand larceny should contain the words "without the consent of the owner." *State v. Richmond*, 228 Mo. 365; *State v. Waller*, 174 Mo. 518. It is not essential that an instruction on grand larceny contain the words "with the

felonious intent to convert the same to his own use." The words "stolen" and "steal" charge a defendant, in a larceny charge, with the essential criminal intent, and mean a taking away "knowingly without any claim or pretense of right" and "with intent wholly to deprive the owner of the goods," or "to convert them to the use of the taker." Kelley's Criminal Law and Procedure (3 Ed.), sec. 651; Kelley v. State, 14 Ind. 36. Webster defines the word "steal" as "To take and carry away feloniously; take clandestinely without right or lief, as the personal goods of another." This is the common acceptance of the word "steal," and the ordinary layman when he hears that one "did steal" is impressed with the idea that the property of another has been taken and carried away without right or leave with the intent to convert the same. State v. Fitzpatrick, 32 Atl. (Del.) 1072; 2 Abbott's L. Dict., p. 503; Anderson's L. Dict., p. 973; Black's L. Dict. (2 Ed.), p. 1109; 3 Strande's Judicial Dict., p. 9134; In re Gannett, 39 Pac. 496; Alexander v. State, 12 Tex. 540; People v. Tomlinson, 508 Cal. 19; State v. Dewitt, 142 Mo. 76. To steal in many jurisdictions has been defined to mean "to take and carry away feloniously" and "take without right or leave and with intent to keep wrongfully." Baldwin v. State, 46 Fla. 115; State v. Dewitt, 152 Mo. 85; People v. Lammerts, 164 N. Y. 137; Hughes v. Terr., 8 Okla. 28, 31; State v. Smith, 31 Wash. 245; State v. Richmond, 228 Mo. 362. (2) The court did not commit error in refusing appellant's requested instruction number 2. This instruction defines an accomplice, and states that an accomplice is equally guilty with a party committing the theft. Sec. 4898, R. S. 1909; State v. Tobie, 141 Mo. 556.

FARIS, J.—From a conviction in the circuit court of Boone county of the crime of grand larceny and a sentence therefor to imprisonment in the penitentiary

for a term of two years, defendant, pursuant to the usual procedure, has appealed.

The facts presented by this record and upon which this conviction is sought to be sustained, are unique. The defendant at the time of the commission of the larceny alleged was, and for some days prior thereto had been confined, in the calaboose of the town of Centralia upon the charge that he had illegally sold intoxicating liquor; so that his alibi was perfect, so far as concerns his actual presence at or participation in the alleged larceny. The indictment charged that the property stolen was feed and that it consisted of eight sacks of oats, ten sacks of alfalfa meal, ten bales of alfalfa hay, two bushels of corn and one bale of straw. The actual larceny of this property was accomplished by one William W. Bell, who was the principal witness for the State, and, in fact, the only witness who gave any testimony in any way connecting defendant with this theft.

According to the testimony of said Bell he had been employed by defendant to feed and care for a number of horses owned by defendant during the enforced absence arising from the imprisonment of the latter. Defendant's horses, some seven in number, together with one of Bell's horses, were in a barn at Centralia, which barn had been rented by and was in defendant's possession. After Bell had been in charge of defendant's barn and horses for some two or three days the feed for this stock ran short; thereupon Bell says he went to the calaboose to confer with defendant about the situation, and informed defendant that the feed was almost gone. Bell further says that defendant asked him if he knew where any feed could be obtained, and that he (Bell) replied that he did not. Thereupon, says Bell, the below quoted conversation ensued between him and defendant. Defendant asked Bell: "Do you know where this big barn is out here west of town of Mr. Lee Green's?" I said, 'I do not.' He said:

‘Don’t you know where that barn is out there?’ I said, ‘No.’ He said, ‘Maybe you know it by the John Rutland’s barn?’ I said, ‘Yes, I know where that is,’ and he said, ‘I saw Mr. Green hauling some alfalfa out there in the summer time.’ He said: ‘If you will go out there I am satisfied you can get some feed out there. If there is any out there, get it and bring it in and I will pay you for it and I will allow you on what you owe me’—on a mare I bought. He said if I didn’t want to take the wagon and team out there first I could go and ride the pony out and find it. He said I might work a big brown horse with a big foot and an old sorrel horse with a bald face. I said all right if I could find collars. I could not find a collar for the sorrel horse. I worked my grey horse and his brown horse after this feed.”

Following the substance of the testimony of the witness Bell, but without further quoting his exact language, he said that he left the defendant’s barn in Centralia between twelve and one o’clock, went out into the country near the edge of town to the barn of one W. L. Green and there stole eight sacks of oats, ten bales (*sic*) of alfalfa meal, ten bales of alfalfa hay, two bushels of corn and one bale of straw; that he loaded this feed on a one-horse wagon and drove the same into the defendant’s barn (except for the loss of a portion thereof, which slipped from the wagon on the way), there unloaded it and placed it in the hallway of said barn, and that near defendant’s barn he broke the double-tree of his wagon. Bell further says that in the morning between five and six o’clock he went to the calaboose and again saw the defendant, told him fully what he had done, and that instructions were given him by the latter to unload and store the stolen feed and cover it with a tarpaulin and to lock the doors of the barn, and to fasten the windows with wire; all of which Bell did.

The witness Bell, confessedly the actual thief, was arrested for the larceny in question at about nine o'clock on the morning following the theft. At first and for some several days, Bell, while admitting his own guilt, denied that defendant was in anywise connected with this larceny. Subsequently, and after a few days, he changed his story and said, as he did upon trial in his sworn testimony, that defendant had been the active mover in procuring his commission of this larceny.

The defendant testifying for himself, while admitting that Bell had called on him at the calaboose at about 5:30 o'clock in the morning following the larceny and had then confessed to him the manner in which he had obtained the feed, yet contended that the larceny was without his prior knowledge, procurement or consent, but that on the contrary he had given Bell the money with which to purchase feed and expected him to buy feed and not steal it. Defendant also testified that Bell was stealing this feed for himself, and intended to haul it to a barn out in the country where Bell had some horses of his own, but that he had broken a double-tree while in the neighborhood of defendant's barn, which misfortune made necessary the unloading of the feed therein and thus explained the presence of the feed in this barn.

The bad reputation of appellant for morality and truth and veracity was shown by the State. The State was also permitted to show that the constable and various other persons "suspicioned" from the beginning defendant's connection with this larceny. Since, however, no objection was made to this outrageous sort of evidence the point is not before us for review.

The actual confessed thief, Bell, was likewise indicted for this larceny and entered a plea of guilty thereto and was by the court paroled.

The above is deemed a sufficient statement of the facts as will serve to make clear the points discussed

in the opinion here. These points will be further illuminated by such statement of facts as may become necessary in the opinion.

OPINION.

I. Instruction numbered one, which defendant very insistently urges as erroneous, is as follows:

“The court instructs the jury that if you find and believe from the evidence, beyond a reasonable doubt, that at the county of Boone and State of Missouri, on or about the 24th day of November, 1913, one William Bell did unlawfully steal, take and carry away the goods and chattels of W. L. Green as charged in the first count of the information in this case, and if the jury further find from the evidence that the defendant prior to the stealing, taking and carrying away of the said goods and chattels advised, procured, encouraged, counseled or commanded the said William Bell to steal, take and carry away the goods and chattels as aforesaid, and that said goods were of the value of thirty dollars or more, then you will find the defendant guilty under the first count of the information and assess his punishment at imprisonment in the penitentiary for a term not less than two years nor more than five years.”

**Larceny:
Instruction:
Words “With
Felonious
Intent”
Necessary.**

The gravamen of defendant’s objection to the above instruction is (to express it in counsel’s own language) that “it omits the all important part of the definition of larceny, to-wit, the words, ‘with a felonious intent.’ ”

The State contends on the other hand most insistently that the use of the word “steal” comports a wrongful and fraudulent taking together with the felonious intent to convert the property in question to the use of the taker and to deprive the owner thereof permanently without his consent. Since the instruction in

question uses the words "take and carry away," we need not, and we do not, take the latter words into consideration in this discussion. Concededly they would have been used in a good instruction just as they are used in this one. In other words, the State's position is, that since the word "steal," which is used in this instruction, ordinarily means and is generally understood as meaning by everybody, from the "college professor to the common laborer," to "take and carry away feloniously; to take without right or leave and with intent to keep wrongfully," there is neither verbal nor legal necessity, nor rhyme nor reason, in using the words feloniously, or in further defining larceny when once the word "steal" is used in an instruction in connection with the words "take and carry away," as here in this instruction. Bearing out their contention learned counsel for the State call our attention to the meaning of the word "steal" in its plain and ordinary sense, as used in our statute, and as the same is defined by lexicographers as well as by the law-writers and law dictionaries. It is defined, say counsel, by Webster's Unabridged Dictionary, thus: "To take and carry away feloniously; to take without right or leave," as to steal the personal goods of another. The most comprehensive definition which has been called to our attention is that found in the Century Dictionary and Cyclopedia, which defines the word "steal" to mean: "To take feloniously; take and carry away clandestinely and without leave or right; appropriate to one's own use dishonestly or without right, permission or authority." So much is said to make clear and state fairly and sharply the respective contentions made.

Going back to the definition of the crime of larceny at common law we find some little contrariety of definition, but in the main find that there must be a felonious, i. e., fraudulent, unlawful and wrongful, taking and carrying away of the personal property of an-

other, coupled with the intent to convert the property in question to the use of the taker without the owner's consent. For illustration, Lord COKE defines it thus: "Larceny by the common law is the felonious and fraudulent taking and carrying away by any man or woman of the mere personal goods of another." [3 COKE's Inst. 107.] Mr. WHARTON defines it thus: "Larceny may be defined to be the fraudulent taking and carrying away of a thing without claim or right, with the intention of converting it to a use other than that of the owner, without his consent." [WHARTON, Crim. Law (13 Ed.), sec. 1095.]

CHITTY in his learned work on criminal law (3 CHITTY's Crim. Law, 917) says: "To constitute this offense [larceny], therefore, in any form, there must be a taking from the possession, a carrying away against the will of the owner, and a felonious intent to convert it [i. e., the personal property] to the offender's use."

MR. EAST in his Pleas of the Crown (vol. 2, p. 553) defines larceny to be "the wrongful or fraudulent taking and carrying away by any person of the mere personal goods of another from any place, with a felonious intent to convert them to his (the taker's) own use, and to make them his own property, without the consent of the owner." "But even this definition," says Prof. GREENLEAF, "though admitted by PARKE, B., to be the most complete of any, was thought by him to be defective in not stating what was the meaning of the word 'felonious,' in that connection; which, he proceeded to say 'might be explained to mean that there is no color of right or excuse for the act;' adding that the 'intent' must be to deprive the owner, not temporarily, but permanently, of his property." [3 GREENLEAF's Evidence, sec. 150.] To the same general trend are all of the other authorities, which purport to define the crime of larceny as it existed at common law. [2 BISHOP's New Crim. Law, sec. 758; 2 ROSCOE's

Crim. Ev. 816; 1 Hawkins, P. C., p. 142; Rex v. Hammon, 2 Leach, 1083.]

It is the rule in this State by our solemn statute, as well as by all of the holdings of our courts, that the common law is in force and that it shall be the only rule of decision, unless, and until it has been abrogated and changed by the statute itself. [Sec. 8047, R. S. 1909; Brandon v. Carter, 119 Mo. 572.]

Turning to our statute which defines the crime of grand larceny, we find it to read, so far as pertinent here, thus: "Every person who shall be convicted of feloniously stealing, taking and carrying away any money, goods, rights in action, or other personal property or valuable thing whatsoever of the value of thirty dollars or more . . . belonging to another, shall be deemed guilty of grand larceny. . . ." [Sec. 4535, R. S. 1909.]

It will be observed that the word "feloniously" is put by the law-makers into (or to look at the matter from the angle of its common law origin, is left in) this statute as a part of the definition of grand larceny. Except in the above section defining grand larceny, and in section 4530 and 4531, each of which defines larceny in connection with robbery in the first and second degrees, respectively, we have not been able to find that the Legislature has left in any other criminal statute the word "feloniously" as a part of the definition of any other felony. Even in defining certain grand larcenies which are made such by reason of the special circumstances attending the commission thereof, the word "feloniously" is not used in our statutes: Compare section 4537 (theft of domestic fowls in the nighttime); section 4538 (theft from dwelling house, railroad cars, or the person of another); section 4541 (larceny by altering mark or brand, or by killing animals).

Prior to 1825 no attempt was made to define larceny. [See Mo. Territorial Laws, 1804-24, sec. 13, p.

18 (1804) ; sec. 16, p. 213 (1808) ; sec. 9, p. 476 (1816).] Punishment therefor was prescribed by law, but the elements which went to make up and which were required to describe and define this offense, manifestly, therefore, remained as at common law. In 1825 the words "feloniously steal, take and carry away" first came into our statute denouncing the theft of money, personal goods and chattels. [Laws 1825, sec. 25, p. 286.] Even then horse-stealing was not so defined, and still stood (denounced by a separate section, viz., section 33, p. 289, *Ibid.*) as at common law. In 1835 the section denouncing the theft of horses, slaves, etc., was combined with that containing the words "feloniously, steal, take and carry away," and which denounced grand larceny as to practically all other personal property. [R. S. 1835, sec. 30, p. 177.] Ever since 1825 therefore the crime of grand larceny defined in said section 4535, Revised Statute 1909, has been defined uniformly (exceptions as to special offenses above noted, excepted) by the use of the words "feloniously stealing, taking and carrying away." We have seen the necessity which existed at common law to use this word "feloniously" or its apt synonyms in defining larceny, and we see that while the Legislature had the power to relieve us from the necessity of so defining it, for some reason, sufficient to itself no doubt, it has not seen fit to do so. That we might or might not deem it wise to do so, is beside the question; the fact remains that the word "feloniously" as a word of legal description, has remained in our larceny statute for ninety years precisely as it formerly stood in a majority of the common law definitions of this crime. The Legislature put this word—which upon some considerations may appear technical, useless and tautological—into our statute, or to be more exact left it therein, and it is for the Legislature to take it out. Uniformly almost, throughout the ninety years of the statute's existence in its present form (as to this

point), this court has by its decisions required that instructions defining this crime make necessary the finding of a felonious intent. Touching this phase Scott, J., in a very early case, said:

"It will thus be seen from what has been observed, that there cannot be a larceny without a felonious intent. That the taking the personal goods of another without this intent, may be a trespass, but it cannot amount to larceny. The prisoner, then, might have done every act supposed by the instruction of the court without being guilty of a felony. The instruction defined a trespass, and not a larceny, and it was error to have told the jury that the commission of the acts mentioned in it, rendered the prisoner guilty of larceny." [State v. Witt, 9 Mo. l. c. 665.]

Likewise, in the very late case of State v. Richmond, 228 Mo. l. c. 366, GANTT, J., said:

"But the first instruction of the court in this case was insufficient in that it did not require the jury to find that defendant feloniously took, stole and carried away the mare mentioned in the information, nor did it require them to find that defendant took, stole and carried away the mare with the felonious intent to convert the same to his own use without the consent of the owner, and therefore we think it falls short of the instruction in the Waller case, 174 Mo. 518."

To the same effect in substance are the holdings in the cases of State v. Gray, 37 Mo. 463; State v. Shermer, 55 Mo. 83; State v. Moore, 101 Mo. l. c. 329; State v. Speritus, 191 Mo. 24; State v. Fritchler, 54 Mo. 424; State v. Gresser, 19 Mo. 247; State v. Lackland, 136 Mo. 26; State v. Weatherman, 202 Mo. 6; State v. Rutherford, 152 Mo. 124; State v. Ware, 62 Mo. l. c. 602; State v. Campbell, 108 Mo. 611; State v. Owen, 78 Mo. l. c. 371. Similar is the language of the various text-writers upon this subject. [Kelley's Crim. Law & Prac. 657; 2 Bishop's New Crim. Law, sec. 840; 4 Black Com 232; 25 Cyc. 45, and cases cited.]

The case is a close one upon the facts. The testimony of the guilty principal, if not well-nigh incredible, is at least subject to the very gravest suspicion. For while it leaves no doubt as to the guilt of Bell, who confessedly committed the larceny, it does, when viewed as a whole, leave huge doubts as to the guilt of defendant. In such cases the jury ought to have been instructed touching the felonious intent of Bell at least, when he took the feed in question, and to this by a proper instruction should have been tacked the intent, the *animo furandi*, of defendant himself when as alleged he advised and counseled this theft. No authority anywhere can be found upholding this instruction. It is bad by all the decisions and by the textbooks, in practically every jurisdiction where larceny is defined as our statute defines it or where the common law is in force. Therefore, though it be the passing fancy of the hour to rejoice more over the ninety and nine guilty, who, though *legally* convicted, are paroled, than over the one of doubtful guilt *illegally* convicted, to whom our judgment gives a lawful trial, we must yet abide, as our official oaths enjoin, by the statutes and the Constitution as the Legislature and the people have ordained them.

II. The question as to the form of such an instruction now becomes pertinent. This is a seriously debatable and a most puzzling problem. In a case involving larceny the offense should be defined. Manifestly this may be done either by a separate instruction, as was approved in the case of State v. Gray, 37 Mo. l. c. 464, or by appropriately incorporating an apt definition of larceny in the main instruction, as was done in the case of State v. Yates, 159 Mo. 525. Ordinarily the words "felonious" and "feloniously" have no place in an instruction in a criminal case. [State v. Helton, 234 Mo. 559; State v. Cummings, 206 Mo. l. c. 624;

Larceny:
Form of
Instruction.

State v. Rader.

State v. Scott, 109 Mo. 226.] Likewise, ordinarily, it is not necessary to define them. [State v. Barton, 142 Mo. l. c. 455; State v. Rowland, 174 Mo. 373; State v. Woodward, 131 Mo. 369; State v. Miller, 159 Mo. 113; State v. Cantlin, 118 Mo. l. c. 111.] But we have seen that at common law all the definitions of larceny either contained the word "felonious" applied to the intent with which the property was taken, or conveyed by circumlocution and the use of synonymous words, the idea that the taking was with a felonious intent. We have also seen that our statute since the year 1825 has contained as a part of the definition of grand larceny the word "*feloniously*." This former state of the common law definition, and the present state of our definition, make it plain by all of the rules of law and of statutory construction that since the word "*feloniously*" is left in our statute, it is there for some purpose, to-wit, that by reason of it our statute retains so much of the common law definition of larceny as is comported by this word. That the use then of the word "feloniously," or some synonymous words properly defining larceny, is required in an instruction in a prosecution for grand larceny, there is no chance for doubt. In so requiring, it is clear that *larceny is an exception to the general rule* which we note, *supra*, which says that the words "felonious" or "*feloniously*" need not be used in an instruction, and if used they need not be defined. Even in prosecutions for robbery in the first degree, on all-fours by analogy both in the respect that a larceny is committed ordinarily and that the statutes defining it likewise use the word "*feloniously*," we find no such invariable rule. On the contrary the general rule is in robbery as in ordinary cases, that *feloniously* need not be used in the instruction, or if used that it need not be defined. [State v. Woodward, *supra*; State v. Cantlin, *supra*; State v. Rowland, *supra*.]

There is much contradiction of authority in the many reported cases in this State as to whether the specific word "feloniously" should be used in an instruction for grand larceny to define the intent with which the taking was accomplished, or whether synonymous words aptly describing the intent as we find it in a respectable number of the definitions of larceny at common law would suffice. A small number of our cases apparently adhere half-heartedly to the latter rule (*State v. Moore*, 101 Mo. 328; *State v. Owen*, 78 Mo. 367; *State v. Weber*, 156 Mo. 249); the later cases succinctly and clearly (the late case of *State v. Ward*, 261 Mo. 149, and *State v. Yates*, 159 Mo. 525, excepted) hold that the use of the specific word "feloniously" with reference to the intent, is necessary. [*State v. Weatherman*, 202 Mo. 1. c. 9; *State v. Richmond*, 228 Mo. 1. c. 366.] So also did the very early cases: *State v. Witt*, 9 Mo. 663; *State v. Gray*, 37 Mo. 463. The case of *States v. Yates*, 159 Mo. 525, squarely holds that it is not necessary to use the specific word "feloniously" if synonymous words are used. But one or the other of these methods must be followed in an instruction for grand larceny. The instruction here, we repeat, follows neither, and is therefore erroneous from any view. Having regard to many of the common law definitions of larceny which omitted the word "felonious" and the variant holdings on this point and on analogous questions by this court, we conclude that an instruction for grand larceny ought to require the finding by the trial jury that the taking was with a felonious intent, but that the use of the specific words "felonious" or "feloniously" is not absolutely a prerequisite. This intent may be aptly defined by terms indicating the wrongful and fraudulent, or criminal nature of the taking, coupled with words charging the taking as being without the owner's consent and with the fraudulent intent to convert the property to the use of the taker and to deprive the owner thereof per-

manently. [Bodee v. State, 57 N. J. L. 140; State v. Slingerland, 19 Nev. 135; State v. Shepherd, 63 Kan. 545; State v. Yates, 159 Mo. 525; State v. Speritus, 191 Mo. l. c. 36; 35 Cyc. 148, and cases cited.]

III. Complaint is made that the jury was not required to find that the defendant in the alleged procuring of said Bell to commit the larceny charged, acted with a felonious or criminal intent. We think this contention must be sustained. It should need no citation of authority to prove that if defendant did not intend that Bell should steal the feed, but intended, as defendant's theory of defense urges, that Bell should buy the feed, the issue of defendant's criminal intent should have been left to the jury under appropriate instructions. The defendant as an accessory before the fact merely was not liable for a crime committed by Bell which was contrary to, or the result of an absolute, or even a substantial departure from, or disregard of defendant's instructions. Defendant in what he said to Bell in counselling, or commanding the crime, must have had a criminal (here since the crime was grand larceny, a felonious) intent, though he need not have intended the precise crime which was committed. Since it is sufficient if the crime done by the principal is the probable consequence of the crime advised by the accessory, as if one hire another to burglarize a house and in so doing the principal kill the owner of the house.

IV. The complaint made that the second instruction is erroneous because it assumes that Bell stole the feed, without leaving this fact as an issue to be found by the jury, would ordinarily be well taken, but here the whole case rests on the sworn admission of Bell that he did steal this feed. No one denies it. Defendant does not controvert it, but in terms concedes

Accessory:
Must Act
With
Felonious
Intent
in Grand
Larceny.

Instruction:
Assumption
of Fact.

it. It is not an issue then in the case. The issue is, did defendant advise, procure or command the commission of the admitted theft of Bell? We disallow this specific point; though again suggesting that the intent with which defendant counselled and advised said Bell, must have been a felonious intent.

Other matters are complained of, but it is not likely that they will occur again, should the case be again tried, so we need not add to the length of these views by a discussion of them.

From what is said it follows that the case should be reversed and remanded, which is accordingly ordered. *Walker, P. J.*, concurs in separate opinion; *Brown, J.*, concurs in result.

WALKER, P. J.—(Separate opinion).—That the case learning on the subject is in accord with the conclusion of my learned brother that an instruction defining grand larceny should contain the words “with felonious intent” I do not question; but where, as in this case, the words “unlawfully steal, take and carry away” are employed, the use of the omitted words of which complaint is made, is not only redundant, but tautological.

The word “felony” simply designates crime in a general way, and larceny is but a specific designation of one of the many forms of felony; when, therefore, one is said to have unlawfully stolen, taken and carried away a certain thing, the intent and the crime are indubitably declared and nothing is added to the clearness or force of the charge by adding that the offence was committed with “felonious intent.”

Bound in the throes of precedent, as is said by my learned brother, it may be necessary to use these words in the instruction, and if so I am impelled to say what I have herein said that the necessity of legislative action may be emphasized. I therefore concur in the result reached in the majority opinion.

THE STATE v. HENRY MOULTON, Alias, Etc.,
Appellant.

Division Two, November 24, 1914.

1. **APPEAL: Failure to Perfect.** From a conviction of burglary in the second degree and a former conviction of felony, defendant on April 1, 1913, was granted an appeal; on May 31, 1913, he secured an order of the trial court requiring the stenographer to furnish him a copy of the evidence as a poor person; on April 1, 1914, he filed his petition in the Supreme Court asking to be permitted to prosecute his appeal as a poor person, which motion was sustained on April 14, 1914, and on that day he filed a transcript of the record proper; on August 14, 1914, he filed a second transcript, which embraces a copy of an order showing the filing of the bill of exceptions and also a copy of the bill; this second transcript recites that the bill of exceptions was filed by the clerk of the trial court on June 10, 1914, and that the clerk's certificate to said transcript is dated July 14, 1914. The Attorney-General, on October 15, 1914, moved the court to dismiss the appeal. *Held*, that defendant having omitted to state any reason why his second amended transcript covering the bill of exceptions was not lodged within the Supreme Court in a more expeditious manner, none of his exceptions and no part of the transcript except the record proper can be considered.
2. ———: ———: **Filing Bill of Exceptions: Law of 1911 and Sec. 5313.** The amendment to section 2029, Revised Statutes 1909, found in Laws 1911 at page 139, does not authorize an appellant in a criminal case to file a transcript of his bill of exceptions in the Supreme Court at any time before the rules of the court require him to serve his abstract of the record upon respondent; for there is nothing in said amendment evincing any intention on the part of the General Assembly to repeal section 5313, Revised Statutes 1909, requiring appeals in criminal cases to be perfected within one year; and before a statute can be repealed there must be either a legislative design to repeal, or an irreconcilable conflict between the old and new law.
3. ———: ———: ———: **Suggestion of Good Cause.** By the express words of Sec. 5313, R. S. 1909, if a defendant in a criminal case fails to perfect his appeal within one year, he may avoid the dismissal thereof when the Attorney-General has moved to dismiss, by showing to the satisfaction of the Supreme Court "good cause" for not sooner perfecting his

appeal, and that right he still has since the amendment of 1911 to section 2029, but the duty still rests on him to make a satisfactory showing that he has been unremitting in his diligence to perfect his appeal within twelve months after it was granted, and if he fails to make any showing his bill of exceptions cannot be considered. Said amendment applies to appeals in criminal cases, in so far as it permits the filing of bills of exceptions after the time granted by the trial court for filing has expired, provided such delay is not the result of appellant's own act of omission.

4. ———: ———: **Filing Transcript.** When a defendant in a criminal case has not obtained the permission of the Supreme Court to prosecute his appeal as a poor person until the time has expired for perfecting his appeal, he should immediately, upon obtaining such permission, tender to the clerk his transcript of the entire record, or make a satisfactory showing why he is unable to do so.

Appeal from St. Louis City Circuit Court.—*Hon.*
James E. Withrow, Judge.

AFFIRMED.

Durham & Durham for appellant.

John T. Barker, Attorney-General, and *Thomas J. Higgs*, Assistant Attorney-General, for the State.

BROWN, J.—Charged with both burglary in the second degree and a former conviction of felony, defendant was found guilty, and, under the provisions of section 4525 and 4913, adjudged to serve the term of his natural life in the penitentiary, from which judgment of conviction he appeals.

The Attorney-General has filed a motion to dismiss the defendant's appeal on the ground that it was not perfected within one year after the same was granted, as required by section 5313, Revised Statutes 1909.

A brief history of this appeal is necessary in reaching a correct conclusion on the motion to dismiss. The appeal was granted on April 5, 1913; on

May 31, 1913, defendant secured an order of the trial court requiring the stenographer to furnish him a copy of the evidence as a poor person; on April 1, 1914, he filed his petition in this court asking to be permitted to prosecute his appeal as a poor person, which motion was sustained on April 14, 1914. On the day last named defendant filed in this court a transcript of the record proper. On August 14, 1914, defendant filed a second transcript, which embraces a copy of an order showing the filing of the bill of exceptions, and also a copy of the bill of exceptions. This second transcript recites that the bill of exceptions was filed with the clerk of the trial court on June 10, 1914, while the clerk's certificate to said transcript is dated July 14, 1914.

With the record in this form the Attorney-General, on October 15, 1914, moved the court to dismiss the appeal. The defendant has filed suggestions in opposition to the motion to dismiss, in which he recites the various steps taken by him to perfect his appeal, but omits to state any reason why his second transcript covering the bill of exceptions was not lodged in this court in a more expeditious manner. His contention is that the amendment of section 2029, Revised Statutes 1909, found in the Laws of 1911 at page 139, authorized him to file his transcript of the bill of exceptions at any time before the rules of the Supreme Court required him to serve his abstract of the record upon respondent.

This insistence of defendant cannot be sustained, because there is nothing in the aforesaid amendment which evinces an intention on the part of the General Assembly to repeal section 5313, Revised Statutes 1909, requiring appeals in this class of cases to be perfected within one year.

It is a cardinal principle of statutory construction that laws will not be repealed by mere implica-

tion. There must be a legislative design to repeal, or an irreconcilable conflict between the old law and the new. [State ex rel. Clarke v. Wilder, 97 Mo. 27, l. c. 35, and cases there cited; State ex rel. v. Wells, 210 Mo. l. c. 620.]

Where there is not in the new statute a manifest legislative design to repeal a law then in force, the courts will, if possible, give such construction to the new law as will allow both the old and new to stand. [State ex rel. v. Stratton, 36 Mo. l. c. 429, and cases there cited.]

By the very words of section 5313, supra, if a defendant fails to perfect his appeal in the time required by that section he may, nevertheless, avoid the dismissal of his appeal when the Attorney-General has moved in that behalf, by showing to the satisfaction of the court "good cause" for not perfecting his appeal within the statutory period. What will constitute good cause has wisely been confided to the judgment of the Supreme Court, which tribunal will determine the same on the particular facts presented to it in each case.

Before section 2029 was amended by the Act of 1911, if an appellant had shown to the satisfaction of this court that, after due diligence on his part, he was unable to file a transcript of the record because the official stenographer or clerk had not acted in a timely manner, this court would have refused to sustain a motion to dismiss his appeal.

We see no reason why section 2029, as amended in 1911, does not apply to appeals in criminal cases, in so far as it permits the filing of bills of exceptions after the time granted by the trial court for such filing has expired, provided such failure does not grow out of any act of omission on the part of appellant. Such construction does not conflict with the provisions of section 5313, supra, which still stands in full force. When, as here, the Attorney-General's motion to dis-

miss is filed, the appellant, if in default in perfecting his appeal, must make a satisfactory showing that he has been unremitting in his diligence to perfect his appeal within the twelve-month period after it was granted.

In the recent case of *State v. Pieski*, 248 Mo. 715, the acts which constitute the perfection of an appeal in a felony case were recited, and we adhere to what was said in that case. However, what was there said related chiefly to the nonpayment of the docket fee, the principal issue in that case. In said *Pieski* case (248 Mo. 715) we stated that the defendant's application to prosecute his appeal as a poor person "ought to be made before the lapse of the one-year period." The defendant's application in the case at bar was made four days before the year had expired, and was in time.

The rule of this court permitting defendant to prosecute his appeal as a poor person (by making a proper showing), and the statute (section 5313) permitting him to consume one whole year in perfecting his appeal, are very liberal and should not be expanded by judicial construction, for the reason that criminal laws when not administered with reasonable dispatch become a farce. When, as in this case, a defendant has not secured permission to prosecute his appeal in this court *in forma pauperis* until the time has expired for perfecting his appeal he should immediately upon securing such permission tender to the clerk of this court his transcript of the entire record, or make a satisfactory showing why he is unable to do so.

In the case at bar defendant's application to prosecute his appeal as a poor person, though filed four days within the twelve-month period, was not acted upon and sustained by this court until eight days after the year had expired; and instead of having his transcript of the entire record ready and filing same upon that date, he merely filed a certified transcript of the

record proper without, in any manner, informing the court that he intended subsequently to file a transcript of his bill of exceptions.

Under these facts we hold that defendant elected to prosecute his appeal upon the record proper alone. The facts hereinbefore recited show that the defendant did not file his bill of exceptions with the clerk of the trial court until June 10, 1914, nearly three months after the twelve-month period elapsed, and the transcript of the order showing the filing of such bill of exceptions and the transcript of the bill was not lodged in this court until August 14, 1914. This second transcript shows that it was certified by the clerk of the trial court on July 14, 1914, a month before it was filed here.

Upon the above facts, when the motion to dismiss his appeal was filed, the defendant, after due notice, made no showing whatever tending to indicate diligence on his part, but merely filed suggestions in opposition to the motion, in which he asserts that, under the law, he was entitled to file the transcript of his bill of exceptions at any time within thirty days before the cause was reached on our docket. His insistence cannot be sustained, and the motion to dismiss, in so far as it relates to defendant's right to a review of the alleged errors noted in his bill of exceptions, will be sustained.

However, the transcript of the record proper having been filed at the time he was granted the right to prosecute his appeal as a poor person entitles him to a hearing upon the record proper. After a careful examination of the same we find no errors therein. The judgment is, therefore, affirmed.

Walker, P. J., and Faris, J., concur.

THE STATE v. HOWELL MACE, Appellant.

Division Two, November 24, 1914.

1. **INFORMATION: Felonious Intent.** An information which, after alleging the assault was feloniously made with a shotgun, and that the shooting and striking were done feloniously, states that the assault and shooting were done "with the intent then and there him the said Herod Williams on purpose and of his malice aforethought feloniously to kill and murder," sufficiently charges felonious intent to kill by means of a firearm.
2. ———: **Shotgun: Judicial Knowledge.** The courts judicially notice the dangerous and deadly nature of a shotgun and other like firearms. But that is not true of a rock, club and some other weapons.
3. **JUROR: Challenge.** An attempted challenge of a venireman in his *voir dire* examination, in the words, "The defendant's counsel object to the juror; challenge him for cause," is the same as no challenge at all. A challenge for cause must be specific and point out the ground or reason for the challenge.
4. ———: ———: **Unnecessary Hazard.** But while such an attempted challenge cannot be considered on appeal, it is observed that courts and prosecuting attorneys, without reason, often do the unwise and unnecessary thing of hazarding a prosecution upon the retention of a juror whose competency is uncertain, when it is always possible, usually from bystanders, to secure jurors about whose fairness and impartiality there can be no question.
5. ———: **Prior Opinion: Directed to Crime and Not to Defendant.** An expression by a trial juror indicating he entertained strong prejudice against the crime committed, by whomsoever committed, but not directed towards defendant, does not disqualify him, if upon his *voir dire* he testifies he has formed no opinion of defendant's guilt or innocence and will give him a fair trial. So that where a witness, by affidavit in support of a motion for a new trial, swore that she heard one of the trial jurors say "a fellow like that ought to be sent to the penitentiary," and the juror, in a counter affidavit, swore that he was at the store at the time named, that a message came over the telephone that the prosecuting witness was fatally wounded and his wife was dying, that it was reported that the shooting had been done by defendant's father, that other persons present expressed the opinion that a person

who would commit an act such as was detailed over the telephone should be in the penitentiary, but that he had no recollection of having made any such remark himself and if he did it was based on the telephone report, and that at no time or place prior to the trial had he said defendant was guilty, but that whatever he may have said was to the effect that if a person was guilty of such an act he should be in the penitentiary, and said juror on his *voir dire* had sworn he had formed no opinion, and the trial court, after hearing the affidavits, overruled the motion for a new trial, it will not be held that the juror possessed such bias or prejudice as precluded him from giving defendant a fair trial, there being doubt as to whether the remark was made at all, and doubt if made whether it referred to the defendant or pertained to a general but commendable detestation of crime, and in such case the rule is that the doubt should be resolved in favor of the ruling of the trial court.

Appeal from Miller Circuit Court.—*Hon. J. G. Slate*, Judge.

AFFIRMED.

Barney Reed and *Sid C. Roach* for appellant.

(1) The court erred in overruling defendant's motion for new trial and of defendant's motion to exclude Juror J. S. Lumpkin from the panel. R. S. 1909, sec. 7283. The evidence given by Juror J. S. Lumpkin on his *voir dire* examination shows that he had a fixed opinion as to the guilt or innocence of the defendant and that his opinion was such as to require evidence to overcome it and as to influence his judgment, and if so, he was not a qualified juror. *Spangler v. Kite*, 47 Mo. App. 233; *Theobald v. Transit Co.*, 191 Mo. 395. When an opinion is formed on newspaper reports alone, in order to qualify as a juror in his *voir dire* examination it should be shown and clearly appear from the record that such juror would fairly and impartially try the case and render a verdict based upon the evidence produced at the trial alone, notwithstanding such opinion. *State v. Rasco*, 239 Mo. 535; *State*

v. Bobbitt, 215 Mo. 10. (2) It is clear that Peach Wall was incompetent to serve as a juror in the trial of this case; he had, previous to the trial, formed and expressed his opinion in a pronounced manner among his neighbors, and in his *voir dire* examination concealed such fact from the defendant. *Gibney v. Transit Co.*, 204 Mo. 704; *State v. Foley*, 144 Mo. 600. (3) The information in this cause is defective in that it fails to properly charge that the assault was committed by the defendant "with felonious intent," and the defendant's motion in arrest should have been sustained.

John T. Barker, Attorney-General, and *S. P. Howell* for the State.

(1) The information contains every essential element necessary to constitute the crime charged, and is drawn in accordance with forms which have repeatedly met with the approval of this court. Sec. 4481, R. S. 1909; *Kelley's Crim. L. & Pr.*, sec. 576, p. 505; *State v. Barton*, 142 Mo. 453; *State v. Johnson*, 129 Mo. 26; *State v. Bond*, 191 Mo. 565; *State v. Bartlett*, 209 Mo. 404; *State v. Foister*, 202 Mo. 46; *State v. Sovern*, 225 Mo. 583. It is unnecessary to aver in the information, when the assault is made by shooting, that it was committed with a deadly weapon. The effect produced, as detailed in the evidence, is sufficient confirmation of the deadly qualities of the instrument employed. *State v. Laycock*, 141 Mo. 274; *State v. Harris*, 209 Mo. 434; *State v. Keener*, 225 Mo. 488. (2) The court did not err in accepting J. S. Lumkin as a juror in this case. This juror stated in his *voir dire* examination that he knew nothing about the case except from newspaper reports which did not pretend to give the details fully. Although he testified that he had formed an opinion, or rather an impression had been made upon his mind from such reading, yet he further stated that if he

were selected as a juror in the case he would be governed by the law and the evidence and the instructions of the court. *State v. Cunningham*, 100 Mo. 388; *State v. Schmidt*, 136 Mo. 650; *State v. Church*, 199 Mo. 631; *State v. Bronstine*, 147 Mo. 530; *State v. Darling*, 199 Mo. 196; *State v. Vickers*, 209 Mo. 12; *State v. Bobbitt*, 215 Mo. 46; *State v. Rasco*, 239 Mo. 557. The juror Peach Wall was qualified and competent to serve as a member of the trial jury in this cause. It seems clear that whatever expression, if any, this juror had made prior to the trial was based on common rumor, and that it was leveled at the nature of the crime committed and not at the guilt or innocence of this particular defendant. Remarks based on common rumor and evidencing the existence of bias or prejudice against the crime committed constitute no sufficient ground for rendering a juror incompetent to serve as such. *State v. Core*, 70 Mo. 491; *State v. Burns*, 85 Mo. 47; *State v. Gonce*, 87 Mo. 629; *State v. Sykes*, 191 Mo. 76; *State v. Reed*, 137 Mo. 132; *State v. Forsha*, 190 Mo. 324; *State v. Myers*, 198 Mo. 250.

FARIS, J.—Defendant was tried in the circuit court of Miller county upon an information charging him with the violation of section 4481, Revised Statutes 1909, for that he had on purpose and of his malice aforethought shot one Herod Williams, with a certain shotgun. He was convicted and his punishment fixed by the jury at imprisonment in the penitentiary for a term of two years; from the sentence which followed he has duly appealed.

The information upon which the conviction of defendant was had becomes pertinent for the reason that he challenges the sufficiency thereof. The attack upon the information is somewhat general, but in order to illustrate the point we append this information (caption and verification, both of which were in due form, omitted), as follows:

"Walter S. Stillwell, prosecuting attorney within and for the county of Miller, in the State of Missouri, under his oath of office informs the court that one Howell Mace on the 1st day of July, 1913, at the county of Miller, in the State of Missouri, in and upon one Herod Williams, feloniously and on purpose and of his malice aforethought, did make an assault, and did then and there on purpose and of his malice aforethought feloniously shoot him the said Herod Williams, in and upon the head and neck of him, the said Herod Williams, with a cetrain shotgun which he the said Howell Mace then and there had and held in both his hands, with the intent then and there him, the said Herod Williams, on purpose and of his malice aforethought, feloniously to kill and murder, against the peace and dignity of the State."

The facts, in the light of the points urged for reversal, are not particularly pertinent, but in order that some connected idea may be had as to these facts, which to a slight extent illuminate the discussion of the alleged errors, we append them:

The defendant Mace and the prosecuting witness Herod Williams were farmers, residing on adjoining farms, some three miles from the little village of Uhlman in Miller county. The farm occupied by defendant lies north of that occupied by the prosecuting witness and is owned by defendant's father, one John Mace, who resides with him. A narrow lane, which it seems was only a few feet in width, runs between the two farms, which lane is fenced on either side by a single barbed wire. The house occupied by defendant and that occupied by the prosecuting witness were only some quarter of a mile apart and plainly in view from each other. Bad feeling had existed and divers other clashes had occurred between defendant and said Williams during a period of some two years.

On July 1, 1913, the day of the shooting, the prosecuting witness was engaged in plowing a field of corn.

At about the hour of nine o'clock in the morning of that day he hitched his horse to a fence post and went to the house for the purpose of getting a drink of water. After getting this drink the prosecuting witness started back to his plowing and to the point where he had hitched his horse. About the time he got back near the place where he had been plowing he noticed, as he testifies, that a hen and a brood of chickens belonging to him, and which had been following his plow that morning, were over in a stubblefield belonging to the Maces. In order to make them return to his premises he picked up a rock or clod, which he threw at the hen, and thus frightened her and caused her to come back upon the prosecuting witness's side of the lane. Thereupon he turned toward his plowing and was in the act of unhitching the bridle rein of his horse from a post, to which he had tied it, for the purpose of again resuming his work, when he saw defendant running toward him from defendant's house, carrying a gun, using profane and vile epithets and saying, "I will kill you this time." The prosecuting witness tells us that he had not before on that morning seen defendant; that he had had no trouble with him or with any of his family that day and was at first in doubt as to whether the language of defendant was directed toward him. But as defendant continued to approach him, armed with a gun and in a threatening manner and upon his repeating the opprobrious epithet the prosecuting witness asked defendant to stop and come no further. Upon defendant replying with an oath and continuing to come toward the prosecuting witness the latter started toward his own house, meeting upon the way there his wife, who came toward him carrying a pistol. This pistol, the prosecuting witness testified, he asked his wife to give him, but she refused and the witness after a struggle with her, being unable to secure possession of the pistol, turned and went with her toward the fence where the horse was hitched and toward which

point, as the context shows, the defendant was himself moving. An altercation then ensued between defendant on the one hand and the prosecuting witness and the latter's wife on the other, in the course of which both the defendant and the prosecuting witness called one another liars and in which the defendant, according to the testimony of both Mrs. Williams and the prosecuting witness, applied to Mrs. Williams a very vile epithet. After some further altercation the defendant fired at Williams with the gun which he was carrying, which it seems was a 20-gauge single-barreled shot gun loaded with number four shot, striking Williams in the forehead with a number of the pellets. Immediately thereupon the prosecuting witness called to his wife to shoot the defendant. Mrs. Williams began firing the revolver which she was carrying and continued to do so as rapidly as she could pull the trigger till she had fired five shots and emptied the weapon. Defendant then came up closer to Williams and his wife and firing with the gun at Mrs. Williams shot her in the wrist and left breast. The prosecuting witness picked up a rock, which he threw at the defendant while defendant was reloading his gun and then turned, as he says, to assist his wife, who was seriously wounded, in getting back to the house. As he turned his head and back to the defendant the latter again fired and shot the prosecuting witness in the back of the head, causing the latter to fall. From these shots the prosecuting witness was confined to his room for some week or ten days, recovering finally, and apparently fully.

The state of facts above briefly set out are taken largely from the testimony of the prosecuting witness, who is, however, corroborated by his wife. The testimony of the defendant, his wife and his father tends to prove that the defendant acted in self-defense; that he had procured the gun and started toward the scene of the difficulty for the purpose of protecting his fa-

ther, at whom the prosecuting witness was throwing rocks. He further swears, and both his father and his wife corroborate him, that the shooting was begun by Mrs. Williams and that she had twice fired the revolver at him before he fired a shot at either her or the prosecuting witness. We need not concern ourselves with this, however, since this conflict in the evidence has been resolved by the triers of fact against defendant and is no longer a debatable question here.

Upon the trial of the case objection was made to the competency as a juror of one John S. Lumpkin, who was chosen as one of the panel of twenty-four, but was not upon the panel of twelve who actually tried defendant.

Likewise after the trial the competency of one Peach Wall, who was a member of the panel of twelve who actually tried defendant, was attacked in the motion for a new trial and this attack was attempted to be backed up by the affidavit of one Mrs. Janie Thomas. This affidavit becomes pertinent and is as follows, omitting caption, signature and jurat:

"Mrs. Janie Thomas, of lawful age, being first sworn, on her oath says that on or about the — day of —, 1913, and within a few days after an alleged assault by one Howell Mace upon Mr. Williams in Miller county, Mo., that at Faith, in Miller county, Mo., she was in the store building of James Wall, where there were a number of people gathered together discussing the case of State of Missouri v. Howell Mace, charged with assault on said Williams and his wife, that one Peach Wall was also present, and in discussing said case the said Peach Wall, being the same person who was on the jury in the trial of said case in circuit court of Miller county, Missouri, expressed his opinion in said cause as to what should be did at the trial thereof by saying in referring to Howell Mace, the defendant, that 'a fellow like that' (mean-

ing Howell Mace, the defendant) 'ought to be sent to the penitentiary.' "

Counter-affidavits were filed by the State; one by Wall, the juror whose competency was attacked, in fair effect denying the truth of Mrs. Thomas's affidavit, and one by the prosecuting attorney Stillwell, touching the facts which transpired upon the *voir dire* examination of said Wall. The affidavit of Wall, caption, signature and jurat omitted, is as follows:

"Peach Wall, of lawful age, being first duly sworn, says that he remembers being present in the store of James Wall at Faith, Miller county, Mo., within a very short time after the shooting of Mr. and Mrs. Herod Williams by Howell Mace, at which time there were a number of men present; that words had just been received by them over the telephone that Mrs. Herod Williams was either dead or dying and that Mr. Williams was fatally injured as a result of the shooting, but that the report at that time was that John Mace did the shooting; that affiant left the county about that time and it was several days afterwards before he found out that Howell Mace did the shooting; that there were some expressions made by those present to the effect that a person who was guilty of an act of that kind should be in the penitentiary, but this affiant states that he has no recollection whatever of having made such an expression or statement himself, but that if he did make such an expression it was based on the report which had just been received as aforesaid.

"Affiant says that he remembers there were several persons present at said time and place and engaging in the conversation regarding said shooting, and that some expressions were made as above, but affiant states the fact to be that at no time and place prior to the trial of the case of the State of Missouri v. Howell Mace in the circuit court of said county did he make the expression or statement that the defend-

ant was guilty of the crime charged and that if he made any expression at all at the time and place aforesaid it was to the effect that if a person was guilty of such an act he should be in the penitentiary.

“And further affiant saith not.”

The affidavit of Stillwell, the prosecuting attorney, in substance states that upon the *voir dire* examination of said Wall the latter stated upon his oath in the presence of defendant and of the latter's counsel, that he (Wall) had had a conversation with the brother-in-law of the prosecuting witness but that he (the juror) had not formed or expressed any opinion as to defendant's guilt or innocence; that the juror was thereupon examined touching the condition of his mind as to bias and prejudice and as to the opinion, if any, which the juror had expressed in the conversation aforesaid. He denied having either bias or prejudice, or having any opinion as to defendant's guilt or innocence. These three affidavits for and against the alleged bias of the juror Wall comprised all of the proof offered upon this phase. The learned trial court held that no sufficient prejudice or bias was shown, and overruled this assignment of error.

The three points mentioned, that is to say, the alleged insufficiency of the information and the alleged incompetence of the jurors Wall and Lumpkin are the only points made by the defendant. To the discussion of these the appended opinion is directed.

OPINION.

I. The first point urged by defendant's learned counsel as a reason for reversal is that the information is bad. We have set it out in full in the statement, except the caption and verification, which are in proper form. Defendant's only specific attack upon this information is that it does not charge that the assault

**Information:
Felonious
Intent.**

upon the prosecuting witness Williams was made with a felonious intent. Even a casual examination of this information discloses that defendant is in error as to this. After alleging that the assault was made feloniously; that the shooting and striking were done feloniously, the information concludes by charging that the assault and shooting were done "*with the intent then and there, him the said Herod Williams on purpose and of his malice aforethought, feloniously to kill and murder.*" This is sufficient and the information is a good charge for an assault with intent to kill perpetrated by means of a firearm (Kelley's Crim. Law & Prac. 576; State v. Bond, 191 Mo. 555; State v. Doyle, 107 Mo. 36), the dangerous and deadly nature of which we know and judicially notice. The distinction to be observed in drawing an information under said section 4481, when the lethal weapon is a rock, club or some other weapon, the dangerous and deadly nature of which courts do not judicially notice, is obvious and is fairly well disclosed by the very language of the section in question. We are forced to disallow this contention.

II. The next contention is that the juror Lumpkin was incompetent. This juror's name does not appear on the trial panel of twelve, so he must have been on the original *venire* of twenty-four and have been challenged off by either the State or the defendant. We pretermitt the discussion of how far this fact of itself might minimize the alleged error, since upon this record we need express no opinion on the above suggested phase.

The record discloses that this juror did not personally know the defendant; that he was in some doubt as to whether he knew Williams; that he had read some newspaper accounts of this assault, from which sole source he had formed an opinion as to the guilt

or innocence of defendant, which opinion he still had and which was of such character as to require some sworn testimony for its removal. He said, however, that he would be governed by the sworn testimony. Thereupon counsel for defendant objected to the retention of this juror thus: "*The defendant's counsel objects to the juror, challenges him for cause.*"

Thereafter, counsel for the State undertook to compel a qualification of the juror and at the end got him to say that "he thought he was capable of laying aside and would lay aside the opinion which he now had and be governed by the sworn testimony alone."

We need not take the time to consider whether the juror was competent or not, since as clearly appears no proper objection, or rather no proper challenge for cause, was made to his competency. A challenge for cause must be specific and point out the ground or reason for the challenge. It is no more sufficient to object simply, or to say that the juror is challenged for cause, which is but a legal conclusion, than it is to object to the offer of inadmissible evidence, for that it is not competent. [State v. Fields, 234 Mo. 615; State v. Bobbitt, 215 Mo. 10; State v. Tucker, 232 Mo. 1; State v. Miles, 199 Mo. 530; State v. Myers, 198 Mo. 225; State v. McCarver, 194 Mo. 717; State v. Evans, 161 Mo. 95; State v. Soper, 148 Mo. 217; State v. Albright, 144 Mo. 638; State v. Dyer, 139 Mo. 199; State v. Reed, 137 Mo. 125; State v. Taylor, 134 Mo. 109.] It follows that this point is not well taken.

In passing we take the opportunity to say that the small trouble of telling an incompetent juror to stand aside and of calling, ordinarily from the by-standers, a competent one to take his place, ought so lightly to weigh against the hazard to the case of refusing to take this step, and against the oftentimes outrageous unfairness to a defendant on trial, mayhap for his life, that ordinarily neither the court *nisi* nor the State's counsel, out of the abundance of caution and impar-

tiality, should ever take so momentous a chance. But for most unaccountable reasons, we have long observed that in a great majority of cases the moment the defense undertakes to disqualify a juror the State (aided more often than necessary by the trial court) rushes to the juror's relief as if the particular juror were Atlas and the world rested on him. It is no reflection on the trial court or on the State's attorney to have counsel for defendant disqualify a proposed juror; it is more often a reflection on both judge and counsel when they refuse to permit it. With the world absolutely filled with competent, unbiased and unprejudiced jurors, error in this behalf is usually gratuitous and unnecessary, a few notorious *causes celebres* excepted.

III. Complaint is likewise made that one Wall, who was on the trial panel of twelve, was

Juror:
Prejudice.

a prejudiced and incompetent juror and one who had before the trial both formed and expressed an opinion of defendant's guilt.

We set out the affidavits bearing pro and con upon this juror's alleged incompetence. A reference to the statement of facts as we set them out, shows that the affidavit of Mrs. Janie Thomas was filed in support of the allegation of Wall's bias, in which affidavit it was charged that "said Peach Wall being the same person who was on the jury in the trial of said case, expressed his opinion in said cause as to what should be did [*sic*] at the trial thereof by saying in reference to Howell Mace, the defendant, that 'a fellow like that' (meaning Howell Mace, the defendant) 'ought to be sent to the penitentiary.'" In opposition to the charge contained in the affidavit of Mrs. Thomas, the affidavit of said juror Wall was filed, which affidavit we likewise set out. Reference to it discloses that in fair substance Wall says that while at the place mentioned by Mrs. Thomas in her affidavit, he heard from

a conversation over the telephone that John Mace had shot both Mr. and Mrs. Herod Williams; that the former was dying and the latter fatally wounded; that affiant (the juror Wall) shortly after this left the country temporarily and did not for a number of days thereafter learn that defendant Howell Mace did the shooting; that other persons present expressed the opinion that a person who was guilty of an act such as was detailed over the telephone ought to be in the penitentiary, but that affiant has no recollection of having made any such remark himself, but if he did so, it was based on the telephone report aforesaid; that at no time or place prior to the trial of defendant did affiant make the statement that defendant was guilty of the crime charged, but that whatever he may have said was to the effect that if a person was guilty of such an act he should be in the penitentiary. It further appears that upon his *voir dire* this juror swore he had formed no opinion. Upon this state of the proof touching bias the learned trial court ruled against the defendant and overruled the assignment of alleged error based upon the juror's alleged incompetence. Was this error?

It appears in a reasonably clear way when we analyze fairly what the juror Wall swears he said, that his bias and the views he expressed were not against the defendant at all, but that he entertained strong prejudice against the crime committed, by whomsoever committed, the report whereof had come to him without details over the telephone. His animosities were impersonal, directed toward that which telephone rumor characterized as a most heinous offense, and not toward defendant himself at all. In fact he did not learn that defendant did the shooting till some days after the alleged statements are said to have been made. In such state of things what was said in *State v. Sykes*, 191 Mo. l. c. 76, is appropriate:

"It is true some of them said they were prejudiced against this kind of case or crime, but not against a man charged with such crime before being proven guilty. It was held in *State v. Bryant*, 93 Mo. 273, and in *State v. Williamson*, 106 Mo. 162, that persons who have formed opinions of the guilt of an accused upon trial for crime, from rumor or newspaper reports, are not for that reason rendered incompetent to sit as jurors on the trial of the case, where they answer upon their *voir dire* that they can give the defendant a fair and impartial trial. [*State v. Duffy*, 124 Mo. 1.] A juror who states on his *voir dire* examination that he has formed and expressed an opinion as to the guilt or innocence of the accused and that the opinion has been formed from rumor or newspaper reports, and it will require evidence to remove it, is not incompetent, provided it appears to the satisfaction of the court that such opinion will readily yield to the evidence in the case and that the juror will determine the issues upon the evidence adduced in court, free from bias. It is said in *State v. Cunningham*, 100 Mo. 382, that all doubts should be resolved in favor of the finding of the trial court, and the question of the qualification of the juror must be determined from his whole examination, including his demeanor while answering questions under oath touching his qualifications as a juror."

We abate not one jot or tittle from the rule laid down in *State v. Gonce*, 87 Mo. l. c. 630, that "it is settled law in this State that it is a good ground for a new trial when a juror on his *voir dire* examination has stated that he has neither formed nor expressed an opinion as to the guilt or innocence of the accused, and after verdict it comes to the knowledge of the accused that such juror had prejudged the case, and that fact is made to appear to the satisfaction of the court. In such cases the question as to whether the juror had prejudged the case is one of fact to be determined by

the trial judge, as any other question of fact on sworn statements." We are nevertheless of the opinion, the source of the rumor considered, the doubt whether the remark was made at all or not, and the doubt of its applicability to defendant, or to a general but commendable detestation of heinous crimes, that we ought to defer to the finding of the learned trial court. [Morgan v. Ross, 74 Mo. 318; State v. Cook, 84 Mo. 40; State v. Gonce, supra.] This we do and disallow this contention.

Finding no other error properly preserved, we are of opinion that the case should be affirmed. Let this be done. *Walker, P. J.*, and *Brown, J.*, concur.

THE STATE v. HARRY FIELDS, Appellant.

Division Two, November 24, 1914.

1. **APPEAL: Criminal Case: No Brief.** Although appellant in a criminal case has filed no brief, still the Supreme Court under the statute must review the complete record.
2. **INDICTMENT: Venue: Stated in Margin.** It is sufficient that the venue be named in the margin or cation of an indictment.
3. **——: Time: Not of Essence of Offense: Killing Animal With Intent to Steal it.** Time is not of the essence of the offense of wilfully killing an animal with intent to steal it, and therefore an indictment is not invalid that fails to state the time when an alleged offense of that kind was committed.
4. **OBJECTIONS TO EVIDENCE: Exceptions: Appeal.** To avail upon appeal an objection to the admission of evidence must assign a reason or ground why the evidence is objected to, and an exception must be saved to the court's action in overruling the objection.
5. **VERDICT: Supported by Evidence: Appeal.** Before the Supreme Court will relieve on the ground that the verdict is not supported by the evidence, there must be either a total failure of the evidence, or it must be so weak that the necessary

State v. Fields.

inference is that the verdict is the result of passion, prejudice, or partiality.

6. ———: ———: ———: Wilfully Killing Hog with Intent to Steal It. Although in a trial for wilfully killing a hog with intent to steal it, there is no direct evidence that defendant shot the hog with such intent, yet, in view of the fact that the wound in the head of the animal was about the size of a silver dollar and contained portions of paper wadding, almost entirely discrediting plaintiff's statement that, thinking the hog a squirrel, he fired a shotgun at it while he was thirty or forty feet from it, and of the further facts that soon after the shooting he answered, "Nothing, nothing," to a question from a person on the place as to what he was doing, and told the constable on the night of his arrest that "he had killed the hog, he did not aim to let his family starve," it is held that the evidence is sufficient to support a verdict of guilt.

Appeal from Pemiscot Circuit Court.—*Hon. Frank Kelly, Judge.*

AFFIRMED.

Duncan & McCarty for appellant.

John T. Barker, Attorney-General, and Shrader P. Howell for the State.

WILLIAMS, C.—Under an indictment charging defendant, under section 4541, Revised Statutes 1909, with wilfully killing a hog, with intent to steal the same and convert it to his own use, defendant was tried in the circuit court of Pemiscot county, found guilty by the jury and his punishment assessed at two years in the penitentiary. Defendant thereupon perfected an appeal to this court.

The evidence upon the part of the State tends to establish the following facts: About 2 p. m., on the 22d day of November, 1912, a sandy-colored hog, weighing over 200 pounds, the property of one Joe Hampton, was found dead in front of Hampton's residence

and about 40 yards from his barnyard gate. The hog was first discovered by Mrs. Hartwell, a niece of Mr. Hampton, who, with her husband, lived in the Hampton home, keeping house for Mr. Hampton. On the date in question, defendant Fields, in company with one Fred Allen, each on horseback, left the farm of a Mr. Winslow, where defendant Fields had been engaged in harvesting his corn crop, which he had, as tenant, raised on Mr. Winslow's farm, and started to the home of defendant near Wardell, Missouri. The route from the Winslow farm to the defendant's home led by the Hampton farm. Before reaching the Hampton farm, the two men met one Louis Ayres who was carrying a shotgun. Thereupon defendant borrowed the shotgun from Ayres and directed that Ayres and Allen take charge of the two horses and continue on down the road, stating that he would cut across country, through the timber, and hunt for squirrels. Ayres testified that when he and Allen were about half a mile from the Hampton house, he heard the report of a gun followed by the squealing of a hog. The report of the gun was also heard by Mrs. Hartwell, who, returning from taking dinner to her husband, at that time engaged in work about a mile from the house, had reached the vicinity of the barn lot on the Hampton farm when she heard the report of the gun and noticed that the cow, hogs, and chickens in the barn lot were much frightened. She turned into the lot and met the defendant Fields therein, who had a shotgun in his hand. She asked him what he was doing there and he replied, "Nothing, nothing." In a few minutes defendant left the premises but returned shortly and requested Mrs. Hartwell to cook a squirrel for him. This request was refused and defendant again departed. A short time thereafter, Mrs. Hartwell, while doing some chores about the premises, discovered the body of the dead hog, at the place above mentioned. At that time fresh blood was oozing out of the head of the

hog. Mrs. Hartwell's husband and the hired hand about the place returned home about sundown, examined the hog and dressed the same for meat. In their examination and dressing of the hog, they found that a hole about the size of a silver dollar was torn in the head of the hog just above the left eye, and that the wound was made by a shotgun, portions of the paper wadding being found in the wound. After leaving the Hampton premises, defendant joined his companions some distance down the road, and about dusk they arrived at the home of a neighbor about a mile distant from the Hampton farm, where they obtained their supper. At this farm defendant attempted to borrow a wagon, stating that he desired to haul some corn, but the loan of the wagon was refused. Defendant was arrested about the 5th of December by the constable and upon being arrested voluntarily stated to the constable that, on the day in question, he had been hunting in the timber and saw a squirrel run up a tree and while endeavoring to locate the squirrel heard a noise in some nearby bushes and thinking it was a squirrel had fired in that direction and killed the hog. Later, and on the same evening of the arrest, and while defendant and the constable were waiting in a saloon in order to give defendant time in which to furnish bail, the defendant in the meantime having become somewhat intoxicated, stated to the constable "that he had killed the hog; that he did not aim to let his family starve." The evidence on the part of the State further showed that the body of the hog was found in some dead weeds in an open space in front of the house and that the timber did not exist for a space of thirty or forty yards beyond that point. Defendant, who was not cross-examined, testified as follows:

"Well, I had been over at Terry gathering my crop; it was the 22d of November when I got done, so I tried to get a wagon from Mr. Winslow and Mr.

Johnson to take my corn home before they cut the ditch—this ditch was going to be cut on the 25th of November and then I couldn't get my corn to my home without going four or five miles out of the way, so I had started to Wardell to borrow a wagon, so I met Louis on the way as I was going to Wardell and he had a shotgun and I says, 'Now, you fellows take the horses and I'll go through the woods and kill some squirrels,' and I went on through the woods and they taken the horses, and I had killed a couple of squirrels and as I was going along the road I saw another one run across the road and it run up a tree and I run around the tree to shoot it but I couldn't see anything of it, so a little noise attracted my attention, I guess thirty or forty steps away, and I thought I saw the squirrel and I blazed into this place and this hog raised up and squealed and run off; I didn't know the hog was dead until two or three days after that, and when I found out that the hog was dead I offered to pay for it; I come on by there to see him but he wasn't there; I sent Louis there two or three times to pay him for the hog and he said that it was all right.

"Q. What did you think you were shooting at at the time you shot this hog? A. I thought I was shooting at a squirrel.

"Q. What color was it? A. I thought it was a fox squirrel.

"Q. What was the color of this hog? A. Kind of a red—brownish."

Appellant has failed to favor us with a brief in his behalf but, pursuing our statutory duty in the premises, we will proceed to review the complete record which is before us.

I. The indictment is attacked on the grounds that it does not properly charge the venue nor the date of

the commission of the alleged offense. It is true that the body of the indictment does not state the venue. However, the proper venue is named in the caption or margin thereof, and this under the statute is sufficient. [R. S. 1909, sec. 5107; State v. Long, 209 Mo. 366, l. c. 377.]

Neither does the indictment state the time at which the offense was committed. However in the present case time is not of the essence of the offense and the omission therefore does not render the indictment invalid. [R. S. 1909, sec. 5115.]

II. In the motion for new trial, it is alleged that the court erred in excluding proper evidence offered by appellant and in admitting improper evidence offered by the respondent. With reference to the first point, it is sufficient to say that a careful review of the record fails to disclose a single instance wherein the court excluded any evidence offered by appellant. As to the second point the record does disclose some unimportant instances where the court admitted evidence offered by the State over the objection and exception of appellant, but the rulings of the court thereon appear to be free from any error and furthermore in the large majority of instances the record shows that either the objection made did not assign any reason or ground for the objection or when objections were properly made and overruled no exception was saved to the ruling of the court thereon. As to all such instances no matter is preserved for review.

III. Other assignments of error in the motion for new trial allege that the evidence is insufficient to support the verdict.

The evidence shows that defendant killed the hog, which was the property of another. It is true that there is not direct or positive evidence that he wilfully

killed the hog with intent to steal the same or convert the same to his own use, yet we are of the opinion that the evidence is sufficient to sustain the verdict. The fact that the wound in the head of the hog was about the size of a silver dollar and contained portions of paper wadding from the discharged cartridge indicates that defendant was very close to the hog when he fired the shotgun and would almost entirely discredit his statement that he was 30 or 40 steps distant and therefore at such distance as to allow the theory to prevail that he might have mistaken the hog for a squirrel. This, considered in connection with the fact that just after the shot was fired, in answer to the question of Mrs. Hartwell as to what he was doing, he answered, "Nothing;" thereby showing an attempt at concealment of what he had done and the statement which he made to the constable on the night of his arrest that "he had killed the hog; that he did not aim to let his family starve," supplied sufficient facts and circumstances to support the verdict.

The correct rule with regard to the sufficiency of the evidence is stated by FARIS, J., in the case of *State v. Concelia*, 250 Mo. 411, l. c. 424, as follows:

"Where there exists upon the record, what has been rather loosely called any 'substantial evidence' of the existence of a state of facts legally required to be shown, it is our duty to relegate the determination of controverted questions to the triers of fact. 'The rule is, that before this court will relieve on the ground that the verdict is not supported by the evidence, there must be either a total failure of evidence, or it must be so weak that the necessary inference is, that the verdict is the result of passion, prejudice or partiality.' "

We have examined the instructions given by the court and find the same to be free from any error that would work a reversal of the case. Neither does any error appear upon the record proper. It appears that

State v. Barrett.

the defendant has had a fair and impartial trial and that the judgment should be affirmed. It is so ordered. *Roy, C., concurs.*

PER CURIAM.—The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. All the judges concur.

THE STATE v. HARRY BARRETT, Appellant.

Division Two, November 24, 1914.

STEALING FROM PERSON OF ANOTHER: Sufficient Evidence.

The evidence in this case, though the account of the theft by the prosecuting witness is rambling, probably due to his natural stupidity, was sufficient to take the case to the jury, under an indictment charging defendant with having taken \$125 from the person of said witness, as they walked along a public street.

Appeal from Jackson Criminal Court.—*Hon. Ralph S. Latshaw, Judge.*

AFFIRMED.

George L. Walls for appellant.

John T. Barker, Attorney-General, and *Shrader P. Howell*, for the State.

(1) The information in this case is sufficient in form and substance; it contains every essential element to constitute the crime charged and follows the forms approved by this court. Sec. 4538, R. S. 1909, as amended by Laws 1911, p. 194; Kelly's Crim. L. & P., sec. 667, p. 596; State v. Williams, 54 Mo. 170; State v. DeWitt, 152 Mo. 79; State v. James, 194 Mo. 270. The description in the information of the money al

leged to have been stolen is amply sufficient and fully meets the requirements of the statute. Sec. 5111, R. S. 1909; State v. Burnett, 81 Mo. 119; State v. Calvert, 209 Mo. 285. (2) As the sixth assignment of error in his motion for a new trial the defendant complains because the court refused to sustain a demurrer to the evidence at the close of the State's case. A complete answer to this allegation is that nowhere in the transcript except in the motion for a new trial can be found any reference to such request having been made. There is neither reference made to the offering of such instruction, to the action of the court thereon, nor any exceptions entered to the failure of the court to rule. It follows, therefore, that this assignment of error cannot be reviewed here. State v. Williams, 147 Mo. 18; State v. Williams, 186 Mo. 139; State v. Glasscock, 232 Mo. 291; State v. Conway, 241 Mo. 279. (3) The evidence is amply sufficient to justify the verdict rendered. It was for the jury to judge of the credibility of the witnesses and the weight and sufficiency of the evidence. The case was submitted by the court under fair and proper instructions to the jury and having considered the evidence, the jury found defendant guilty as charged. There being substantial evidence to support the verdict, this court will not interfere. State v. Tetrick, 199 Mo. 104; State v. Sassman, 214 Mo. 738; State v. Sharp, 233 Mo. 298; State v. Concelia, 250 Mo. 424.

BROWN, J.—Defendant was convicted in the criminal court of Jackson county on a charge of stealing \$125 from the person of one Garfield Cox, and appeals from a judgment fixing his punishment at five years in the penitentiary.

The evidence of the prosecuting witness Cox is in substance as follows:

That he is a farmer of Putnam county, Missouri, and came to Kansas City about April 10, 1913, for the

purpose of securing medical treatment. A few days after his arrival he started to walk from his hotel to the stockyards. On the street he met defendant Barrett, who, though a stranger, was quite sociable. He gave witness an apple and accompanied him to the stockyards for the alleged purpose of examining some horses. At the stockyards defendant did not concern himself about horses, but commenced gambling by matching coins with a third man whom the witnesses call "Arkansas." Defendant and "Arkansas" tried to induce witness Cox to join them in the gambling, but he declined, explaining that he had no money with him, that his money was at his hotel. Defendant thereupon told Cox that it was very unsafe to leave money at a hotel and made him believe that he ought to get the money and put it in a bank. Pursuant to defendant's suggestion witness Cox and defendant went to the hotel, where Cox took his money out of a valise, placed it in his outside overcoat pocket, and went out on the street with defendant. Witness thought they were going to a bank, but could not recollect what bank. When they had gone a few blocks Cox felt something touch his coat, and looking around saw defendant with the \$125 in his hand. He asked defendant to give up his money, but defendant refused to do so and started away. Cox followed defendant until they met police officer Peters, who arrested defendant. When first approached by the officer defendant was walking arm in arm with a man named Meyers, and witness Cox was some fifty feet behind them.

Officer Peters testified that when he first came upon the parties and saw that prosecuting witness, Cox, was excited and heard him accuse defendant of having his money, he asked defendant if he had Cox's money, to which defendant replied that he had \$125 in money "that Cox gave him to mind for him." Defendant, at the request of the police officer, gave up

Cox's money and it was deposited in the police station.

Defendant, testifying in his own behalf, stated that prosecuting witness Cox had been gambling with him and "Arkansas" and gave defendant the \$125 as a wager or a bet. He denied taking the money from the pocket of Cox.

OPINION.

I. Defendant has not filed any brief. He saved no exception to the admission or exclusion of evidence, and the only point preserved for our review by his motion for new trial is the alleged insufficiency of the evidence to support the conviction. Prosecuting witness Cox gave a somewhat rambling account of his experience with defendant. This was probably due to the natural stupidity of said witness. However, this witness testified positively that he did not gamble with defendant, nor give him his money; that he felt some one touch his coat at a time when he and defendant were walking alone, and, looking around immediately, saw his money in defendant's hand. Defendant admitted having the money, and it was a question of veracity between the prosecuting witness and defendant as to whether witness gave the money to defendant, or whether defendant stole it from the witness. The evidence was sufficient to take the case to the jury, and this point is ruled against defendant. [State v. Concelia, 250 Mo. l. c. 424.]

II. In his motion in arrest defendant makes a general attack on the information "that it is not a proper information." On this assignment it is only necessary to say that we have examined the information, as well as all other parts of the record proper, and find no defects therein. Let the judgment of conviction be affirmed.

Walker, P. J., and Faris, J., concur.

THE STATE v. EDWARD PARKER, Appellant.

Division Two, November 24, 1914.

1. **ROBBERY: At Common Law.** At common law the elements of robbery were practically the same as under the statute, Sec. 4530, R. S. 1909; and therefore common-law adjudications on the subject aid in understanding the statute.
2. ———: **One Offense: Two Methods.** The statute (Sec. 4530, R. S. 1909) denounces but one offense of robbery from the person, which, however, may be committed in two ways, namely: By the felonious taking of the property of another from his person (a) by violence or (b) by putting him in fear of some immediate injury to his person. And if there is neither violence nor putting in fear, the taking of \$2.25 from another's pocket is not robbery in the first degree, but larceny.
3. ———: **Fear: After Crime Has Been Committed.** Where the theft of \$2.25 from another's pocket, accomplished by the accused placing his hand in his pocket and extracting the money therefrom while an accomplice engaged him in conversation, no blow being struck or threatened, no weapon being used or shown, no threat of injury, either immediate or remote, being uttered, and the only fear being that after the money was taken he became frightened, there is no "putting in fear" in the sense in which those words are used in the statute.
4. ———: **Violence: Extracting Loose Coins.** Where the coins stolen were lying loose in another's pocket, and the thief, while an accomplice engaged him in conversation, inserted his hand in his pocket and extracted them, no force or violence being necessary to extract them and there being no knowledge that they were being extracted until the hand was felt in the pocket, there was no such violence as to constitute robbery in the first degree. The violence used in the robbery must precede or be contemporaneous with the taking of the property. [Distinguishing *State v. Broderick*, 59 Mo. 318.]
5. **ROBBERY: Convicted of Larceny.** Under an indictment for robbery the accused may, in a proper case, be convicted of larceny. And where the trial court should have sustained defendant's instruction in the nature of a demurrer to the evidence, since it fails to show he was guilty of robbery, yet as it does show that he was guilty of larceny, he will not, on his appeal, be discharged, but the judgment will be reversed, and the cause remanded for further procedure according to the law and the facts.

Appeal from Marion Circuit Court.—*Hon. David H. Harris*, Judge.

REVERSED AND REMANDED.

Nelson & Bigger and *Whitecotton & Wight* for appellant.

There is no substantial testimony to support the verdict. Therefore the court committed error in refusing to give the demurrer asked by the appellant at the close of the State's case. This was a special demurrer and went only to the sufficiency of the testimony to support the charge of robbery. The testimony of the prosecuting witness wholly fails to show that any property was taken by "violence," or "by putting the owner in fear." One or the other must be shown. Robbery in the first degree under our statute and decisions, involves an intentional putting in fear, or the use of violence by the defendant. *State v. Sommers*, 12 Mo. App. 375; *State v. Smith*, 119 Mo. 439; *State v. Jenkins*, 36 Mo. 372; *State v. Howerton*, 59 Mo. 91. It is of the very essence of robbery in the first degree, that the violence shall be present and immediate, and without it so being there is no case made. *State v. Smith*, 119 Mo. 439. It is not robbery to obtain property from another, without violence to the person by "artifice and tricking." *Thomas v. State*, 91 Ala. 34; *Doyle v. State*, 77 Ga. 513. It is not robbery to obtain property from another by the use of only sufficient force, to remove property from the pocket of the owner. *Fanning v. State*, 66 Ga. 167; *Territory v. McKern*, 3 Idaho, 15; *State v. Sommers*, 12 Mo. App. 374. The strongest case in Missouri, in support of the contention of the respondent that there is sufficient proof, in this case of the necessary force to make out a case against the defendant, is the case of *State v. Broderick*, 59 Mo. 345, and the facts in that

case are very much stronger as to the force used than the facts warrant in this case. The respondent seems to rely on this case, to sustain the conviction of the defendant and copies in its brief nearly all the opinion of the Broderick case, and then contends that the facts in the Broderick case are similar to the facts in this case. The respondent after concluding the quotation from that opinion comments as follows: "The defendant placed himself, unawares immediately to the side of the prosecuting witness, and snatched the money which was then and there attached to the clothes of the prosecuting witness, in such manner as to create a resistance." In what way was the money alleged to have been taken attached to the clothes of the prosecuting witness. This is a new construction of the meaning of the word attach, and one that cannot be followed by any fair minded person. There is no case reported in any of the reports of this State or any other state, that tends to support this contention of the respondent. The respondent is forced by the uncontroverted facts in this case to resort to this construction in order to have this conviction affirmed.

John T. Barker, Attorney-General, and *Ernest A. Green*, Assistant Attorney-General, for the State.

Under the seventh, twelfth and thirteenth grounds of the motion for a new trial, appellant complains that the trial court erred in refusing to give the demurrers to the evidence offered at the close of the State's case and at the close of all the evidence herein. There was no error whatever in overruling these two demurrers. The testimony in the case conclusively showed the defendant to be guilty, at least of petit larceny, and the only question in this case of any serious nature whatever is the question as to whether or not the testimony showed the defendant to be guilty of robbery in the first degree. That testimony showed that this

money was taken from the person of Herman Bockhold by the defendant thrusting his hand in the pocket of the prosecuting witness and pulling the money therefrom. The testimony of the prosecuting witness was to the effect that he suffered the money to be taken because of fear of an immediate injury being inflicted to his person by the defendant Parker and his accomplice Settles. The only question in this case, therefore, meriting consideration is whether or not the testimony of the prosecuting witness is a sufficient showing of violence or of putting in fear of an immediate injury to the person of the prosecuting witness. In this connection we call the court's attention to the cases of *State v. Broderick*, 59 Mo. 319, and *State v. Weinhardt*, 253 Mo. 629. 34 Cyc. 1799; *State v. Montgomery*, 109 Mo. 645, 32 Am. St. 684; *Colbey v. State*, 46 Fla. 112, 110 Am. St. 87; *Mahoney v. People*, 3 Hun (N. Y.), 202; *Comm. v. Davis*, 23 Ky. L. Rep. 1717; *People v. Klein*, 113 Ill. 596; *Smith v. State*, 117 Ga. 320; *People v. Campbell*, 234 Ill. 391, 123 Am. St. 107; *State v. McCune*, 5 R. I. 60, 70 Am. Dec. 176; *Evans v. State*, 80 Ala. 4; *Snyder v. Commonwealth*, 21 Ky. L. Rep. 1538; *Davis v. Comm.*, 21 Ky. L. Rep. 1295; *State v. Nicholson*, 124 N. C. 820; *Comm. v. Titworth*, 30 Ky. L. Rep. 402; *State v. Carr*, 43 La. 418; *Jones v. Comm.*, 112 Ky. 689, 23 Ky. L. Rep. 2081, 99 Am. St. 330, 57 L. R. A. 432; *Stockton v. Comm.*, 125 Ky. 268, 30 Ky. L. Rep. 1302; *State v. Sanders*, 14 N. D. 203; *Britt v. State*, 7 Humphr. (Tenn.) 45; *Coffelt v. State*, 27 Tex. App. 608, 11 Am. St. Rep. 205. In view of the authorities hereinbefore cited, we insist that the trial court properly overruled the demurrers to the evidence offered by the defendant, and that under the testimony the defendant was justly and rightly convicted of robbery in the first degree.

FARIS, J.—Defendant, convicted in the circuit court of Marion county of robbery in the first degree, after the usual motions for a new trial and in arrest, appeals. The punishment assessed upon conviction was imprisonment in the penitentiary for a term of five years.

The facts developed upon the trial so far as they are pertinent to the matters it has become necessary for us to discuss in the opinion, were substantially as follows:

In the afternoon of the 15th of February, 1913, one Herman Buckhold, the man alleged to have been robbed, and who is the prosecuting witness herein, was in the city of Hannibal for the purpose of selling a load of corn and of cashing a check which he had received for a carload of hay. This check was for the sum of \$120 and a few odd cents. The proceeds were paid to said Buckhold in cash, which consisted, odd cents excepted, of twelve ten dollars bills. Shortly after Buckhold obtained this money, defendant sold him a pair of eye glasses for the sum of one dollar. In the course of the sale of these eye glasses to Buckhold, and while paying defendant therefor, the money in the possession of Buckhold was seen by defendant. Some little time thereafter, on the same afternoon and about three o'clock, Buckhold left Hannibal and started upon his return to his residence, the same being some ten or eleven miles in a northwesterly direction from Hannibal. While Buckhold was in Hannibal and between the time of his arrival there, which was about noon, and the time of his departure therefrom, which was about three o'clock, he had drunk some four glasses of whiskey, all of which glasses he ingenuously admits were full ones. On leaving Hannibal he purchased a pint of whiskey, from which, however, prior to the events hereinafter detailed, he swears he did not drink.

Shortly after Buckhold left Hannibal the defendant Parker and one Henry Settle hired a horse and buggy and left Hannibal, ostensibly and as they stated to the liveryman, for the purpose of going to the Oakwood Fair Ground, the same being some two miles from Hannibal, but in a different direction from that taken by Buckhold in going home.

At about the hour of five o'clock defendant and said Settle caught up with Buckhold on the public road, at a point some seven miles distant from Hannibal and engaged in conversation with him with reference to the sort of land to be found in the neighborhood; leaving upon the mind of Buckhold, without (so far as the record discloses) saying so in direct or explicit language, the impression that they were land buyers. Buckhold stopped his wagon; the defendant and Settle drove in front of his team and stopped their buggy, leaving the buggy across the road in such wise as to obstruct the passage of Buckhold's wagon. After some other conversation as to the soil, the country and the scenery within view, defendant and Settle asked Buckhold to drink a bottle of beer with them. Buckhold at first demurred, but subsequently partially acquiesced; but upon defendant and Settle being unable, as they said, to find a bottle opener, Buckhold invited them to have a drink with him from the pint bottle of whiskey which he had theretofore purchased in Hannibal, and which he says had not up to that time been opened. Both defendant and Settle took a small drink of whiskey from Buckhold's bottle; thereafter defendant came up on one side of Buckhold's wagon and Settle upon the other. Settle engaged Buckhold in a conversation relative to changing a twenty dollar bill for him, and while Buckhold was engaged in this conversation with Settle and somewhat engrossed therein, and while he was leaning over toward Settle, who was on the left hand side of the wagon, the defendant climbed upon the front right wheel of the

wagon, placed his hand in Buckhold's righthand pantaloons pocket, and abstracted therefrom the sum of \$2.25 in silver coin. Upon becoming aware of the actions of defendant, Buckhold struck with his whip at defendant and at his team. The team thereupon started very rapidly and defendant was thrown, or stepped, from the wheel.

Since the facts which transpired at the immediate moment of the alleged robbery are pertinent and decisive, and since Buckhold is the only witness who testifies touching them, we in fairness set out below from his testimony what he said and all he said as to the manner in which defendant committed the alleged robbery:

"Q. In your own way tell the jury just how it happened? A. You see, while I was talking to Mr. Settle Mr. Parker got up on the wheel unbeknown to me and got his hand in my pocket, and I never had any idea until I felt his hand in my pocket and felt the money jingle that he was upon the wheel at all. Well, I had the whip in my hand and I just gave him a punch and the team started moving and the wheel turned and Mr. Parker was off. *I guess I was scared. I didn't get scared until I got away.*"

On cross-examination, touching this same matter the prosecuting witness said:

"They brought the bottle back and one wanted me to change the money and the other ran his hand in my pocket. I was leaning over when I felt someone's hand in my pocket. While I was talking to Settle I felt what I thought was a man's hand in my pocket. My hair began to get 'curly' and *I got frightened after the horses started to run.* I didn't think there was anything wrong until he got his hand into my pocket, then I thought it was time for me to get away from him. That was the time when I noticed danger, when he got his hand in my pocket and took my money. That is all I can say. That is the time when I got scared and

dug out. I got scared right then. I didn't see him when he put his hand in my pocket."

Many objections are raised by the defendant, but the above statement and the above excerpts from the testimony of the prosecuting witness illustrate the only one of the alleged errors urged upon us by defendant which we regard as pertinent. Mention of other matters complained of would do no good; such mention would be utterly useless either as an aid to the illumination of this case, or as an aid to the science of jurisprudence, and would but serve to obscure the one decisive point in the case which we discuss in the opinion. If other facts, however, illustrative of this point, shall become necessary, we will advert to them and set them out in the discussion of the legal phase involved.

OPINION.

The chief contention made by the defendant is that the proof does not show that he is guilty of robbery in the first degree, with which crime he was charged in the information and of which he was convicted. At the close of the State's case and again at the close of all of the evidence, defendant prayed the court to so instruct the jury, and the court refused to do so. We set out in the statement all of the testimony bearing upon this contention.

The crime of robbery in the first degree is defined by our statute thus:

"Sec. 4530. Every person who shall be convicted of feloniously taking the property of another from his person, or in his presence and against his will, by violence to his person or by putting him in fear of some immediate injury to his person . . . shall be adjudged guilty of robbery in the first degree."

In passing, though not pertinent except as throwing light upon the cases which we cite which were ad-

**Robbery
in First
Degree:
Insufficient
Proof.**

judged at common law, we may say that at common law the elements of robbery were practically the same as under the statute above quoted. [State v. Lawler, 130 Mo. l. c. 371.]

Our statute denounces but one offense, which, however, may be committed, as to the phase here in question in the instant case, in two ways: by the felonious taking of the property of another from his person, (a) by violence, or (b) by putting him in fear of some immediate injury to his person. [State v. Smith, 119 Mo. l. c. 446.]

Manifestly no lengthy or involved argument is necessary to prove under the facts in the instant case, that Buckhold was not, at or prior to the taking of the silver coins from his pocket, put in fear by defendant, or by his accomplice Settle, of any immediate injury to his person. The fright of him who is robbed must be under the law an objective fright as contradistinguished from subjective fright; it must have been due, in short, to some act on the part of the accused, and not arise from the mere temperamental timidity of the person whose property happens to be stolen from his person or presence. [State v. Weinhardt, 253 Mo. 629.] Here defendant merely put his hand into the pocket of Buckhold while his accomplice Settle engaged him in conversation. The act of theft was wholly accomplished before Buckhold got frightened. No blow was struck or threatened; no weapon was used or shown, nor was any threat of injury, either immediate or remote, uttered by defendant. Robbery by putting in fear then clearly falls out of the case. In fact, learned counsel for the State do not urge this phase of robbery. The State does contend, however, that the force used by defendant in inserting his hand into the pocket of Buckhold and in drawing from such pocket the stolen silver coins was and constituted such violence under our statute as to make out robbery in the

first degree. In this contention we cannot agree. Here the coins stolen were lying loose in Buckhold's pocket; no force or violence was necessary to separate them from Buckhold.

Our attention is called to the case of *State v. Broderick*, 59 Mo. 318; but in that case the watchchain of the prosecuting witness was larcenously taken by defendant Broderick by forcibly tearing it from the vest and from the watch, to both of which it was attached. When the prosecuting witness attempted to recover the chain the defendant struck him and ran. It is fairly clear from the reported case that the striking of the prosecuting witness by the defendant Broderick was after the breaking loose of the chain from the person and after the legal asportation of the chain was consummated. We are not aided at all then by this latter phase of force and violence, since force to prevent arrest, or to prevent recovery of the stolen property after the asportation of the property is complete and after detachment from the person of the owner of the property is consummated, are not necessary elements of robbery in the first degree. [*Kelley's Crim. Law*, 629; *Thomas v. State*, 91 Ala. 34; *Routt v. State*, 61 Ark. 594; *People v. Stevens*, 141 Cal. 488; *Dawson v. Com.*, 74 S. W. (Ky.) 701.] In other words, the violence used in the robbery must precede, or be contemporaneous with the taking of the property. [34 Cyc. 1799.] The presence of force or violence of the latter sort, will not serve to make that act of larceny robbery, which without such belated act of force would have been but ordinary larceny. [*Thomas v. State*, *supra*; *Kelley's Crim. Law*, *supra*; 34 Cyc. and cases cited, *supra*.]

Our court held in the Broderick case, *supra*, that defendant therein was properly convicted of robbery. The distinction between the facts in that case and those in the instant case is obvious. In the Broderick case the chain was attached to the clothing of the pros-

State v. Parker.

ecutor and to a watch, inferably in a pocket of the latter's clothing. In order to remove this chain the thief had to use sufficient force to break it loose both from prosecutor's buttonhole and from his watch; here the coins stolen were merely stealthily lifted from Buckhold's pocket where they were lying unattached to his person. Such filching of loose property from the pocket with no more force than is necessary to lift and remove the property from the pocket is not robbery, but larceny. [Colbey v. State, 46 Fla. 112; Spencer v. State, 106 Ga. 692; Fanning v. State, 66 Ga. 167; Woodward v. State, 9 Tex. App. 412; Johnson v. Com., 24 Gratt. 555; Regina v. Walls, 2 Car. & Kir. 214; Secs. 4538, 4539, R. S. 1909.] The difference between robbery and theft from the person of another which our Legislature has formally and fully recognized by the enactment of said sections 4538 and 4539, Revised Statutes 1909 (amended, Laws 1911, pp. 193 and 194), lies in the force used or fear induced, or in the lack thereof. [People v. Campbell, 234 Ill. 391; Hall v. People, 171 Ill. 540; Rex v. Gray, 2 East P. C. 708; Rex v. Steward, 2 East P. C. 702; Rex v. McCawley, 1 Leach, 287; Rex v. Gnosil, 1 Car. & P. 304; People v. Church, 116 Cal. 300; Jackson v. State, 69 Ala. 240; Fanning v. State, supra; Shinn v. State, 64 Ind. 13; Com. v. Ordway, 12 Cush. 270.] Larceny committed by snatching or jerking the property of another person from such owner's person where such property is so attached to the person or clothing as to afford resistance, or where there is an antecedent or contemporaneous struggle over the taking of the property and asportation from the owner is accomplished by superior force, is robbery (State v. Moore, 106 Mo. 480; State v. Broderick, 59 Mo. 318; Rex v. Moore, 1 Leach, 335; Rex v. Lapier, 1 Leach, 320; Rex v. Mason, Russ. & Ry. 419; Usom v. State, 97 Ga. 194; Smith v. State, 117 Ga. 320; State v. McCune, 5 R. I. 60; Jackson v. State, 114 Ga. 826; State v. Donohue, 59 Atl. 12; People

v. Stevens, 141 Cal. 488; Colbey v. State, 46 Fla. 112; McDow v. State, 110 Ga. 293; Klein v. People, 113 Ill. 596; State v. Miller, 53 Kan. 324; Brown v. Com., 135 Ky. 635); but where the property is taken from the person by merely lifting it from the person or pocket, then it is larceny merely and the prosecution should be had under either section 4538 or section 4539, as amended, according as the property stolen may or may not exceed the value of thirty dollars. If the act of defendant in this case be robbery, then the Legislature did a vain and futile thing in enacting so much of sections 4538 and 4539, *supra*, as denounces thefts from the person.

It follows, that since upon the facts shown defendant was not guilty of robbery, the instruction prayed by defendant in the nature of a demurrer to the evidence should have been given.

This view renders a reversal of the case necessary. We shall not reverse the same and discharge the defendant, however, since it has been held that under an indictment for robbery the accused may properly in a proper case, be convicted of larceny. [State v. Brannon, 55 Mo. 63; 25 Cyc. 103 and cases cited; State v. Keeland, 90 Mo. 337.] Pursuant to the prayer in the appellant's brief we will reverse and remand the case for such action as the State may be upon the law and the facts advised to take. Other errors alleged we need not now notice, as they are such as will not necessarily happen again.

In passing, and in view of the attack made below upon the goodness of the information, but which attack seems to have been practically abandoned here by defendant, we may add that in our opinion the information is sufficient. [State v. Montgomery, 109 Mo. 645; State v. Calvert, 209 Mo. 280; State v. Kennedy, 154 Mo. 268.] It contains, it may be, words of surplusage added by learned counsel who drew it, out of the abundance of caution, but it is nevertheless good.

[State v. Flynn, 258 Mo. 211; Kelley's Crim. Law and Prac. 625.] Let the case be reversed and remanded.

Walker, P. J., and Broun, J., concur.

THE STATE v. HARRY LEVY, *alias*, Etc., Appellant.

Division Two, November 24, 1914.

1. **FORMER CONVICTION: Under Eighteen Years of Age: Evidence.** The transcript of the indictment and the judgment showing defendant has been convicted of burglary in another State, is not incompetent on the sole ground that defendant has testified that at the time of his conviction he was under eighteen years of age, and therefore under the laws of this State he could not have been sentenced to the penitentiary. The jury is never precluded by the oral testimony for either the State or defendant, and was not compelled to believe defendant's testimony, though uncontradicted, that at the time of his conviction in that State he was under eighteen years of age. The transcript was competent evidence, and if it be a fact that his serving of a sentence in the penitentiary of another State cannot be considered by the jury under the laws of this State, because at the time of his conviction he was under eighteen years of age, then his testimony raised an issue which could have been dealt with only by instructions.
2. ———: ———: **No Instruction: Not Raised By Motion for New Trial.** If it be an error of the trial court to fail to instruct the jury that the fact, if it were a fact, that defendant was under eighteen years of age when convicted precludes the jury from considering his said former conviction in another State in assessing his punishment, it was an error of omission to instruct, and in order to be available to defendant on appeal his motion for a new trial should contain a specific assignment that the trial court failed to instruct on the point.
3. ———: ———: **Transcript: Not Properly Certified: Untimely Objection.** An objection that the transcript of a defendant's conviction in another State is not properly certified and authenticated under the laws of Congress, comes too late, if made for the first time after the transcript was admitted and read into the record. When improper evidence is offered it is the duty of the party who might be injured by

its admission to object specifically then and there by informing the court why it should not be admitted.

4. ———: ———: ———: ———: Admission of Attorney That Transcript is in Proper Form. Besides, if when the transcript of defendant's conviction in another State was offered in evidence his attorney informed the court that it was "in proper form," an objection that it was not properly certified and authenticated under the laws of Congress, made after it was admitted and read into the record, should be disregarded, since an admission made by an attorney in open court during the trial of a cause against the interests of his client is presumed to be true.
5. **ROBBERY: Instruction: Recent Possession.** An instruction set out in paragraph three of the opinion, on the subject of recent possession of stolen money and the duty of defendant to explain his possession of it, does not assume that the money found in possession of defendant was the identical money stolen from the prosecuting witness, but requires the jury to find that the money found in defendant's possession was recently stolen from such witness before they are permitted to presume that defendant was the party who stole it.
6. **MISCONDUCT OF PROSECUTING ATTORNEY: Statement of Facts Unable to Prove: Cured By Instruction.** The misconduct of a prosecuting attorney will be weighed in connection with the facts of each case, and when the State's case is weak it will require less misconduct on the part of the prosecutor to work a reversal than where the evidence of defendant's guilt is strong. Where the assistant circuit attorney in his opening statement of the case against defendant charged with robbery, detailed to the jury certain alleged evidence of attempted bribery of the prosecuting witness, and after his failure to introduce such promised evidence, the court properly instructed the jury to disregard the statements pertaining to such attempted bribery, the evil effect of such unwarranted statement was thereby cured, the evidence of defendant's guilt being satisfactory.
7. **ROBBERY: Money: Coins and Bills: Identification: Presumption Arising From Possession.** The prosecuting witness, as he boarded a street car, felt "an unusual disturbance" in his trouser's pocket. Before the car started he discovered his pocketbook was gone, and he immediately got off the car. A police officer, on the car, saw defendant hurry through the car and get off at the front end, and his suspicions were aroused, and he also got off in time to see defendant board another car going in the opposite direction. Upon being informed by the prosecuting witness that his pocketbook had been stolen, the officer followed defendant on the next car and overtook

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him at a cross street as he was coming towards the car track, and when asked what he was doing there he replied that he had gone to that cross street to see a lumberman, but had failed to find him. There was no lumber yard or office in that part of the city. The prosecuting witness testified that he had in his pocketbook when it was stolen, two twenty-dollar bills, one five-dollar bill and a ten-dollar gold piece dated 1902; also five pennies which he had carried for some time as keepsakes, and that they were dirty and one of them of a dark color. When defendant was searched, in one pocket was found a roll of one-dollar bills "nicely folded," and in another two twenty-dollar bills and one five-dollar bill, not folded, but "all crumpled up," and five pennies of the same color and description as those the prosecuting witness had in his pocketbook. No ten-dollar gold piece was found in his pocket, but when his underclothes were removed a ten-dollar gold piece dated 1902 fell out of them. The police office then went to the cross street where defendant was arrested, and about three hundred feet from where the arrest was made found the empty pocketbook. *Held*, that both coins and bills frequently become so discolored or worn as to give them a peculiar appearance by which they can be identified with reasonable certainty, and the stolen money was sufficiently identified to warrant an instruction on the presumption of guilt arising from possession of recently stolen property.

Appeal from St. Louis City Circuit Court.—*Hon.*
William T. Jones, Judge.

AFFIRMED.

Seebert G. Jones for appellant.

(1) The court erred in permitting the introduction of illegal testimony and evidence against the defendant. Sec. 6331, R. S. 1909; Sec. 905, U. S. Law, Appendix Mo. Stat. 1909; *Barton v. Steel*, 65 Mo. 611; *Paca v. Dutton*, 4 Mo. 371; *Moyer v. Lyon*, 38 Mo. App. 635. (2) The court erred in permitting the State to offer in the presence and hearing of the jury, illegal evidence against the defendant, and in permitting the assistant circuit attorney to detail before the jury in his opening statement an alleged attempt to bribe the prosecuting witness by a third party, not in any way connected with the defendant. *State v. Horton*, 247 Mo. 666; *State v. Teeters*, 239 Mo. 485; *State v. Pren-*

dible, 165 Mo. 329; State v. Fischer, 124 Mo. 460; State v. Thomas, 99 Mo. 257; State v. Rothschilds, 68 Mo. 52; State v. Daubert, 42 Mo. 242; State v. Marshall, 36 Mo. 400; State v. Schneider, 35 Mo. 533; State v. Wolf, 15 Mo. 160; State v. Mix, 15 Mo. 153. (3) The court erred in instructing the jury as to the law of the case. R. S. 1909, sec. 5231; State v. Lackland, 136 Mo. 26; Menteer v. Fruit Co., 240 Mo. 186; Cahill v. Railroad, 205 Mo. 405; State v. Weinhardt, 253 Mo. 629; State v. Heath, 221 Mo. 565; State v. Bidstrup, 237 Mo. 273; State v. Shapiro, 216 Mo. 359. (4) The court erred in submitting to the jury the former conviction of defendant because there was no evidence upon which to base it. State v. Austin, 113 Mo. 542; State v. Shapiro, 216 Mo. 359.

John T. Barker, Attorney-General, and *Thomas J. Higgs*, Assistant Attorney-General, for the State.

(1) . The trial court did not commit error in submitting to the jury an instruction on the former conviction of the appellant. It is argued that at the time the appellant was convicted in West Virginia he was under the age of eighteen years, and that in view of the statutes of this State (Sec. 1529, R. S. 1909), the appellant could not have been sent to the penitentiary. If it be assumed that the appellant testified to the truth and that his age was under eighteen in 1905 when he was convicted in Virginia, still the statute of this State does not exempt one from a penitentiary sentence although he commit the crime when under eighteen years of age. Under the decisions of this State, if the defendant at the time of trial and the verdict of the jury is under the age of eighteen, the court may delay the judgment and sentence until the defendant is over the age of eighteen, at which time judgment and sentence can be entered of record and the defendant sent to the penitentiary. Sec. 1529, R. S. 1909; State

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v. Townley, 147 Mo. 207. If, at the time the appellant was convicted in West Virginia when he stated he was under the age of eighteen years, he had been convicted in this State of the same crime he could have been sent to the penitentiary, and, therefore, he was guilty of an offense punishable by imprisonment in the penitentiary. (2) A conviction of burglary in West Virginia and a discharge after service of the sentence was shown by competent evidence. It is not necessary to rely upon the record from West Virginia for the proof of the prior conviction of this appellant in West Virginia. The appellant's own testimony sufficiently proves that the appellant was charged with burglary in Ohio county, West Virginia, on March 13, 1905, and that he was convicted, served his sentence and discharged from the penitentiary. This proof is all that is necessary to prove the former conviction, and the former conviction as admitted and proven by the defendant's testimony in every respect coincides with the former conviction alleged in the information. It was further proven that the appellant at that time was going under the name of "Levy" and was convicted under that name. The decisions of this State and the statutes do not require that the former conviction be proven in any particular manner. Although the former conviction in this case was not perhaps proven correctly by the criminal court records of Ohio county, West Virginia, it was proven by the defendant himself. Former convictions can be proven by the testimony and admissions of the defendant. *State v. Baldwin*, 214 Mo. 302; *State v. Court*, 225 Mo. 615; *State v. Carr*, 146 Mo. 4. (3) Improper remarks in the opening statement do not constitute reversible error. This court has been loath to reverse judgments on account of improper remarks of attorneys in the argument when the proof is clear, for the reason that in such cases a verdict of guilty would have been returned regardless of the improper remarks. *State v.*

Dietz, 235 Mo. 332; State v. Harvey, 214 Mo. 403; State v. Church, 199 Mo. 605; State v. Hibler, 149 Mo. 478; State v. Summar, 143 Mo. 220. Improper remarks of the State's counsel furnish no ground for reversal where the court withdrew the remarks and instructed the jury to disregard them. State v. Wright, 141 Mo. 333; State v. Howard, 118 Mo. 145. Where counsel for the State does not persist in his version of the evidence, but submitted to the court's correction, the judgment will not be reversed. State v. Kiser, 124 Mo. 651. (4) There was sufficient evidence of the appellants' possession of recently stolen property to sustain the court in giving instruction number three. Instruction number three, on the subject of a presumption raised on account of the possession of property recently stolen, was proper in form and in accordance with the decisions of this State. State v. Kelly, 73 Mo. 608; State v. Sidney, 74 Mo. 390; State v. Owens, 79 Mo. 624; State v. North, 95 Mo. 615; State v. Bryant, 134 Mo. 249; State v. Walker, 194 Mo. 253; State v. James, 194 Mo. 277; State v. Hammons, 226 Mo. 604. The evidence sufficiently proves that appellant had possession of property that was stolen from the prosecuting witness, Dr. Burke.

BROWN, J.—Defendant was charged with stealing a pocketbook containing \$61.65 from one Doctor Burke on January 7, 1914, and also with having previously been convicted of the crime of burglary in the State of West Virginia, and, having been found guilty as charged, was sentenced to serve a term of seven years in the penitentiary. After unavailing efforts to secure a new trial and to arrest the judgment he appeals.

The evidence on the part of the State tends to prove the crime charged against defendant and is substantially as follows:

Defendant was seen standing in front of the union depot in St. Louis, Missouri, a few minutes before

Doctor Burke came out of said depot and attempted to board a northbound 18th street car. Burke was carrying a valise and leading a sick woman, and while on the platform of the car he felt "an unnatural disturbance" in his pants pocket. Before the car started he discovered that his pocketbook was gone and immediately got off the car. Police officer Stinger was on the same car and saw defendant hurry through the car and get off at the front end thereof. This act of defendant aroused the suspicion of the police officer and he also got off the car in time to see defendant board another car going south on 18th street. Upon being informed that Doctor Burke's pocketbook had been stolen the officer followed defendant on the next car and overtook him at 18th and Gratiot street. When first seen at Gratiot street defendant was coming towards the street car track, and when asked by the officer what he had been doing he replied that he had gone to Gratiot street to see a lumberman, but had failed to find him. He was then arrested for the alleged theft of Doctor Burke's pocketbook and brought back to the depot, where he announced that he had plenty of money, but had not taken any from Burke. Burke testified that he had in his pocketbook when the same was stolen two twenty-dollar bills, one five-dollar bill and a ten-dollar gold piece dated 1902; also some smaller change, among which were five pennies that he had carried for sometime as keepsakes; that these pennies were dirty and one of them of a dark color.

At the police station defendant was searched and in one of his pockets was found a roll of one-dollar bills "nicely folded" and in another pocket was found two twenty-dollar bills and one five-dollar bill, not folded, but all "crumpled up;" also some smaller change, including five pennies of the same color and description as those Doctor Burke had in his pocket-book.

When no gold was found in defendant's pockets he remarked that he had no ten-dollar gold piece, and that Doctor Burke had lied in charging him with taking his pocketbook and money. However, the police officer continued the search and when defendant's underclothes were removed a ten-dollar gold piece fell out of them. This gold piece bore the date of 1902.

The police officer then went back to Gratiot street, where he had arrested defendant, and, about three hundred feet from where the arrest was made, found Doctor Burke's empty pocketbook lying near some piles of lumber.

Defendant testified that he went out on Gratiot street to call on a lumberman for whom he had been selling lumber, but there was no lumberyard or office in that part of the city. Defendant also stated that he recognized the ten-dollar gold piece found in his underclothes as the same coin on which he had made a small mark with an ice pick several months before he was arrested.

The defendant, further testifying in his own behalf, admitted that he had been convicted in Ohio county, West Virginia, of the crime of burglary, and that he had served a term in the penitentiary of that State and had been discharged. He also testified that at the time he was so convicted he was under the age of eighteen years.

To save the space which would be consumed in repeating them, we will note the alleged errors assigned by defendant in connection with the conclusions we have reached.

I. After defendant rested, the State introduced what purported to be a transcript of an indictment presented against defendant in the criminal court of Ohio county, West Virginia, charging him with the crime of burglary, which transcript also embraced a copy of a judgment showing that

Transcript.

he was convicted in said criminal court under the aforesaid indictment. Counsel for defendant objected to the introduction of this transcript on the sole ground that defendant was under the age of eighteen years when said judgment of conviction was entered, and that, under the laws of Missouri, if he had been convicted of committing the same crime in this State while under eighteen years of age he could not have been sentenced to the penitentiary, but would have been sent to the reform school. That, therefore, the conviction in West Virginia could not be made the basis of a charge of former conviction, as provided by section 4914, Revised Statute 1909. The aforesaid transcript was admitted and defendant excepted; the transcript was thereupon read into the record by the circuit attorney. The court did not err in admitting the transcript over the objection made. There was no evidence of defendant's age before the court except his own testimony, and the jury had the right to disbelieve that evidence if they thought the defendant had testified falsely.

If it is true, as asserted by defendant's learned counsel, that a boy convicted of burglary in this State when under the age of eighteen years cannot be sent to the penitentiary, and that such conviction cannot be treated as a former conviction as defined by section 4914, *supra* (a point which we need not and do not decide in this case), the defendant's evidence that he was less than eighteen years of age when convicted in West Virginia raised an issue which could only have been dealt with by instructions. If defendant's theory of the effect of his former conviction is correct, then it would have been proper for the trial court to have instructed the jury in substance that although they might find defendant had been convicted of the crime of burglary in the State of West Virginia, if they further found and believed that at the time of such conviction he was under the age of eighteen years, they

should disregard such former conviction in determining the duration of his punishment in this case; and that if they found him guilty of stealing the property of Doctor Burke, as charged in the information, they should fix his punishment at not less than two nor more than five years in the penitentiary. Defendant's attorney insists that because defendant testified that he was under the age of eighteen when convicted in West Virginia and there was no other evidence of his age the court erred in submitting to the jury the issue of his former conviction. In this insistence he is in error, because a jury is never precluded by the oral evidence of either the State or defendant, and may always reject evidence which they do not believe to be true.

The trial court omitted to instruct the jury in regard to the alleged fact that defendant was under eighteen years of age when convicted in the State of West Virginia; hence if it committed any error in that regard (a point which we do not decide) it was an error of omission to instruct, and not an error in any instruction given, consequently such alleged error should have been specifically called to the attention of the trial court in defendant's motion for new trial.

Upon a careful inspection of defendant's motion for new trial we find therein no specific complaint of the failure of the court to instruct upon this point, so that the issue raised, or attempted to be raised, by defendant's testimony that he was under eighteen years of age when convicted in West Virginia is not before us for review, because not mentioned in the motion for new trial. [State v. Conway, 241 Mo. 271; State v. Dockery, 243 Mo. 1. c. 599; State v. Sykes, 248 Mo. 1. c. 712; State v. Sydnor and Foster, 253 Mo. 375.]

II. After the aforementioned transcript was admitted and read into the record by the circuit attorney, the defendant objected to it on the additional ground

Objection
Too Late.

that it was not properly certified and authenticated under the laws of the United States, which objection was overruled and an exception saved, which last ruling of the court is now urged for reversal. This insistence cannot be sustained because this objection came too late. When first offered in evidence defendant's attorney informed the court that the transcript was "in proper form." When improper evidence is offered it is the duty of the party who might be injured by its admission to object specifically by then and there informing the court why such evidence should not be admitted. [State v. Pyles, 206 Mo. 1. c. 632; State v. Crone, 209 Mo. 1. c. 330; State v. Wellman, 253 Mo. 1. c. 314.]

An admission made by an attorney in open court during the trial of a cause against the interest of his client is presumed to be true. [Pratt v. Conway, 148 Mo. 1. c. 299; Walsh v. Railroad, 102 Mo. 582.] In Pratt v. Conway, supra, Judge GANTT, in speaking for this court, said:

"Courts are warranted in acting upon the admissions of counsel in the trial of a cause. They are officers of the court, and represent their clients, and their admissions thus made bind their principals."

Certainly no court should be convicted of error for admitting and treating a document as properly certified when the complaining party by his own admissions had led the court to believe that it was "in proper form."

III. Defendant also complains of instruction number 3 given by the court of its own motion, on the ground that it assumes that the money found in possession of defendant was the identical money recently stolen from Doctor Burke. This instruction reads as follows:

"If you find from the evidence that the money, chattels and personal property or any part thereof

mentioned in the information was stolen from the person of Milton C. Burke, and that recently thereafter such property, or any part thereof, was found in the possession of the defendant, and that the circumstances connected with his possession, when first found in such possession, were of such a character as to demand of him an explanation of his possession, and that he failed to make such explanation in a manner consistent with his innocence, then he is presumed to be the person who stole such property, and this presumption will be conclusive against him unless overcome or repelled by evidence, and the burden is on the defendant to adduce the evidence to overcome or repel such presumption to your reasonable satisfaction, but not beyond a reasonable doubt, unless overcome or repelled by evidence introduced by the State.

“Such possession, to raise the presumption of guilt, must have been personal, recent, exclusive and unexplained and must have involved a conscious assertion of property by the defendant, and if any one of these constituents is wanting, then such possession will not raise the presumption of guilt.

“If at the time the defendant was so found in the possession of such property, or any part of it, he gave an explanation which appears reasonable and probably true and consistent with his innocence, then before you can find him guilty upon a presumption arising from such possession you must find beyond a reasonable doubt that such explanation was false.”

We do not think this instruction is subject to the criticism leveled against it. It requires the jury to find that the property found in the possession of defendant was recently stolen from Doctor Burke before they are permitted to presume that defendant is the party who stole the same.

IV. A further assignment of defendant is that the court committed reversible error in permitting the as-

**Misconduct of
Prosecutor.** sistant circuit attorney in his opening statement of the case to detail to the jury certain alleged evidence of attempted bribery of the prosecuting witness. Of course, a prosecutor should not in his opening statement refer to evidence which he cannot legally introduce; but the trial court could not foresee what the evidence in the case would be, and after the prosecutor failed to introduce the promised evidence of attempted bribery the jury were properly instructed to disregard the statements of the prosecutor as to such attempted bribery. We think this cured the evil effect, if any, produced by the misconduct of the prosecutor in mentioning the alleged evidence which he was unable to introduce. It is undoubtedly true that when a prosecutor promises a jury to place before them certain evidence which he cannot or does not produce, his failure to make out the case which he has outlined in his opening statement is liable to prove a boomerang, so to speak, and lead the jury to believe that the charge has not been proven.

If the case was a very close one, and the conviction rested upon testimony that was unsatisfactory, we might consider this point as worthy of serious consideration, for, as we said in the cases of *State v. Hess*, 240 Mo. 147, l. c. 160-1; *State v. Horton*, 247 Mo. 657; and *State v. Baker*, 246 Mo. l. c. 376, the misconduct of a public prosecutor will be weighed in connection with the facts of each case, and when the State's case is weak it will require less misconduct on the part of the prosecutor to work a reversal than where, as in this case, the evidence of defendant's guilt is very strong. [*State v. Helton*, 255 Mo. l. c. 183.] This assignment is overruled.

V. Defendant further insists that the evidence in this case was insufficient to warrant the giving of an instruction on the presumption of guilt which arises

Evidence. from the possession of recently stolen property, citing the case of *State v. Sasseen*, 75 Mo. App. l. c. 202. Of course, it is well known that a great number of bills and coins of each series issued by the United States are in circulation among the people, but that fact in this case only goes to the weight to be given to the State's witnesses.

In the case of *State v. Griffin*, 71 Iowa, 372, there was found in the ice box of the defendant, a saloon-keeper, twenty-five dollars in gold coins of the same denomination as those stolen the day before from one of the patrons of the saloon. In that case the prosecuting witness claimed to be able to identify the coins found in defendant's ice box by a small mark he had placed on them, and on this evidence it was held not error to submit to the jury the presumption of guilt arising from the unexplained possession of recently stolen property.

In the case at bar the minute description given by Doctor Burke of the gold coin and pennies found in defendant's possession, to my mind, points with more certainty to defendant's guilt than did the alleged mark on the coins in the *Griffin* case, for the reason that experience teaches us that it is quite an unusual thing for anyone to actually mark or deface bills or coins, but both coins and currency frequently become so discolored or worn by usage as to give them a peculiar appearance by which they can be identified with reasonable certainty.

The gold coin found in defendant's underclothes, and which he tried to conceal, bore the same date as the one which was stolen from Doctor Burke, and the pennies found in his possession were dirty, and one of them of a dark color, the same as the five pennies which were taken from the prosecuting witness. The following additional cases tend to support the conclusions we have reached on this point: *State v. Newhouse*, 115 Iowa, 173; *People v. Linn*, 23 Cal. 150; *People v. Wong*

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Chong Sney, 110 Cal. 117. This assignment is also ruled against defendant.

We find no reversible error in the record of this case. Defendant was represented by resourceful counsel and had a fair trial. Let the judgment be affirmed.

Walker, P. J., and Faris, J., concur.

THE STATE v. JULIA CORRIGAN, Appellant.

Division One, November 24, 1914.

1. **INSTRUCTION: Failure to Give Defendant's: Covered by State's: Enticing Female to Prostitution.** In a prosecution for taking away from her father a certain female under the age of eighteen years for the purpose of prostitution, it was not error to refuse to instruct the jury that if said girl went to the house of defendant with Lillian Cameron under the circumstances and conditions testified to by said Lillian the verdict must be for defendant, where the court instructed the jury that unless they found that the defendant took said girl from her father "for the purpose of prostitution as mentioned in this instruction, you will find her not guilty," there being no proof of a conspiracy or any connection between defendant and Lillian Cameron until prosecutrix was in defendant's house; for, although it be conceded that said instruction, though a vicious comment on the evidence and therefore not in proper form, pertained to a proper matter of defense which was complete if Lillian Cameron's testimony was true and therefore it was the duty of the court to give a proper instruction on the subject, yet the very substance of the instruction requested was embodied in the one given.
2. ———: **Taking Away Girl for Prostitution: No Definition of Taking Away, Etc.** An instruction telling the jury that if defendant did unlawfully and intentionally take away the fifteen-year old girl from her father, "for the purpose of prostitution, by having illicit intercourse with divers men," etc., thereby fully incorporating the language of the statute, is not erroneous because it does not go further and define the words "taking away for the purpose of prostitution" by stating that such taking away might have been accomplished by persuasion, enticement or inducement of money offered or means furnished by defendant; for, though said additional explanation might

have been proper in view of the evidence, if its omission was an error, it was one in defendant's favor.

3. **CROSS-EXAMINATION OF DEFENDANT: Houses of Prostitution in Other Cities: Denied.** Where, in a prosecution of an accused for taking away from her father a girl under eighteen years of age for the purpose of prostitution, the girl has testified that defendant stated to her at the time she entered her house in St. Charles that she had a house of prostitution in Jefferson City, it was not harmful error for the State to ask her on cross-examination if she had and run such a house in Jefferson City, a matter not mentioned in her examination in chief, where defendant answered that she had not. However, if defendant had admitted that she had or had run such a house in Jefferson City a different case would be up for a ruling. And since no objection was made or exception saved to the State's inquiry of her on cross-examination if she had run such a house in Columbia, the propriety of that inquiry cannot be considered on appeal.
4. **EVIDENCE: Testimony of Event Subsequent to Offense: Harmless Error: Presumption That Officer Performs Legal Duty.** Where defendant was being prosecuted for taking a fifteen-year old girl away from her father for the purpose of prostitution, and a deputy sheriff was offered by the State for the purpose of showing that defendant's house was being operated by her as a house of prostitution some two or three weeks subsequent to the time the prosecutrix was taken therefrom, and the only testimony of said witness was that as such deputy sheriff he went to said house at the time indicated "with the intention of closing it," leaving as an inference that he did not close it, the error in admitting the testimony was harmless; for, it being presumed that an officer performs his legal duty, the inference is that had the house been operated as one for prostitution he would have closed it, and that he did not close it because upon examination he found it was not being so operated, and therefore the error, in so far as it was not innocuous, was in defendant's favor.
5. ———: **Prior Good Reputation of Prosecutrix.** It would be error to admit evidence on the part of the State of the prior good reputation of prosecutrix before the defendant had attacked her reputation. But testimony brought out by a cross-examination of the State's witness to the effect that the loathsome disease which prosecutrix had when she was taken from defendant's house of prostitution, was contracted before she went to said house, and testimony of defendant's witness that prosecutrix was on her way to another house of prostitution when said witness persuaded her to go with her to defendant's house, was as serious an attack upon prosecutrix's reputation

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for chastity as would have been the offering of character witnesses to show her bad reputation for chastity, and authorized the State in rebuttal to show her reputation was good.

6. ———: Taking Away Girl For Prostitution: Intent. The gravamen of the offense of taking away from her father a girl under eighteen years of age for the purpose of prostitution, is the purpose or intent with which the taking away is accomplished; and intent is a hidden mental process, deducible in a criminal case especially, since the State may not use the defendant to prove it, from words or overt acts alone.
7. ———: ———: ———: Shown By Sexual Acts. That the prosecutrix was taken away for the purpose of prostitution can in no way be more clearly shown than by the fact that she was received into defendant's house of prostitution, kept there by defendant, and when occasion offered sent by defendant to a room with a man who gave her money and had sexual intercourse with her.
8. ———: ———: ———: ———: Act of Rape. Nor need the act of sexual intercourse be shown to have been voluntary. The fact that it was accomplished by the forceful ravishment of the girl by a drunken man sent to her room by defendant, with all its ugly details, may be shown in evidence, as a part of the *res gestae*. Nor does the fact that the evidence of the rape and a recital of its details may add to the punishment imposed by the jury, render the evidence incompetent.
9. ———: ———: ———: ———: ———: *Res Gestae*: Accessory. The details of the force used by the drunken man, sent to prosecutrix's room by defendant, are parts of the *res gestae* and are admissible against defendant, though the rape was done out of her immediate presence and not specifically commanded by her to be done. An accessory before the fact, who instigates the unlawful act, is liable; and if the acts are *res gestae* they are always admissible even though they show the commission of another crime committed in the accomplishment of the crime undertaken.

Appeal from St. Louis City Circuit Court.—*Hon.*
James E. Withrow, Judge.

AFFIRMED.

Richard F. Ralph for appellant.

(1) Defendant's requested instruction should have been given, or, if the court deemed it improper

in form, should have been treated as a request for proper instruction covering the subject-matter and it became and was the duty of the court to comply with the same. It is the duty of the court, made such by both statute and long established practice, to instruct the jury upon all questions arising in the case which are necessary for their information in giving a verdict, and a failure so to do has always been held as error; particularly is this true where a proper instruction is either offered or asked and the subject-matter particularly pointed out to the court at the time. *State v. Clark*, 147 Mo. 20. Just such an instruction was given and held proper in *State v. Adams*, 179 Mo. 339. An instruction of like nature was given by the court in *State v. Gibson*, 108 Mo. 579. And whenever it is the duty of the trial court upon a proper request to instruct upon any question of law arising upon the evidence, it is equally obligatory upon it of its own motion to instruct the jury upon such a matter whether requested to do so or not. *State v. Taylor*, 118 Mo. 153. The asking of an instruction improper in form is in effect asking that a proper instruction upon the subject-matter be given. *State v. Stonum*, 62 Mo. 596; *State v. Patrick*, 107 Mo. 172. (2) The prosecutrix, in connection with the alleged act of intercourse had by her, was allowed to testify, over objection, as to the amount of pain it caused her, where she felt the pain, what kind of pain it was, as to her body being bloody or not; in short, all details that would ordinarily be asked a prosecutrix where the defendant stood charged with the crime of rape. These matters did not and could not enter into the essence of the offense charged against the defendant and could only have been offered for the sole purpose of inflaming the minds of the jury, appealing to their passion and prejudice. (3) The court erred in allowing witness Rupp, deputy sheriff, to testify regarding a visit he made the home of defendant in 1913, some two months after the acts

charged against the defendant are said to have been committed, and in attempting to close the house. He may have attempted to close it, honestly thinking it to be a house of prostitution, and may have been mistaken. What he thought or what he did concerning the house in January, 1913, did not have the slightest bearing upon what may have occurred there in December, 1912. (4) The court erred in allowing the defendant to be cross-examined regarding matters in noways arising from her examination in chief and regarding matters totally irrelevant to any issue in the case, over objection, and the State's attorney was permitted to interrogate her repeatedly as to her running a house of prostitution in Columbia, and as to her running a house of prostitution at Jefferson City, such cross-examination not being predicated upon the testimony of any witness and not growing out of the testimony of the defendant in chief in any manner, shape, or form. That such testimony was prejudicial to the defendant is apparent, assuming as we must, that the jury was composed of clean minded men; the very nature of the offense charged would tend to some extent to prejudice them and this testimony could not fail to increase that prejudice and to more highly inflame their passions. - State v. Lovitt, 243 Mo. 520. (5) The court erred in allowing the State to introduce evidence in rebuttal regarding the reputation of prosecutrix; her reputation had in nowise been attacked by the defense and the only shadow of excuse that can be assigned in justification of the court's action is that Lillian Cameron, a witness for defendant, testified that she met prosecutrix on the street and prosecutrix told witness that "she intended to go out on Lucas avenue that day." This we submit was not an attack upon the reputation or character of prosecutrix; the court could not assume that such language, as a matter of fact, indicated any evil or unlawful intent or purposes

on the part of prosecutrix nor could the jury place any such construction upon it.

John T. Barker, Attorney-General, and Lee B. Ewing, Assistant Attorney-General, for the State.

(1) The instructions fully cover the case and follow approved precedents. *State v. Baldwin*, 214 Mo. 290; *State v. Jones*, 191 Mo. 652; *State v. Adams*, 179 Mo. 337. (2) The evidence in this cause shows a taking away from the custody of the parents, within the meaning of the law, within the city of St. Louis. Therefore, the circuit court of that city had jurisdiction of this case. *State v. Johnson*, 115 Mo. 480; *State v. Bussey*, 58 Kan. 679. (3) The evidence was amply sufficient to support the verdict and showed that defendant was guilty of the commission of the crime charged, in the city of St. Louis. *State v. Baldwin*, 214 Mo. 290; *State v. Johnson*, 115 Mo. 480; *Kelley's Crim. Law & Prac.* (3 Ed.), sec. 550; *State v. Bussey*, 58 Kan. 679; *People v. Crook*, 61 Cal. 478; *State v. Jamison*, 38 Minn. 21; *State v. Chisenhall*, 106 N. C. 676. (4) The testimony of Lillian Cameron was such an assault upon the reputation of prosecuting witness as to justify the court in admitting testimony in rebuttal tending to show the good reputation of prosecutrix for chastity and virtue. *State v. Lovitt*, 243 Mo. 510; *State v. Dipley*, 242 Mo. 476; *State v. Jones*, 191 Mo. 653. If there was any error in the cross-examination of defendant as to whether or not she had said she was going to send prosecutrix to Jefferson City, the error was harmless. *State v. Foley*, 247 Mo. 635; *State v. Barrington*, 198 Mo. 77.

FARIS, J.—From a conviction in the circuit court of the city of St. Louis of a violation of section 4476, and a sentence therefor to imprisonment in the penitentiary for a term of five years, defendant, after the usual motion for a new trial, has appealed.

The specific charge is that defendant took away one Rosa Routhiser, a female under the age of eighteen years, from her father for the purpose of prostitution.

Such of the facts in the case as are necessary to understand the points raised by the appeal and discussed in the opinion, are as follows:

Rosa Routhiser (called hereafter for brevity, the prosecutrix) resided with her parents in the city of St. Louis and was at the time of the commission of the alleged offense not quite fifteen years old. She had studied stenography and in the latter part of November, 1912, while in the waiting room of Schaper Brothers in said city, was accosted by defendant who asked her if she wanted a position. She replied in the affirmative and added that she was willing to do almost anything. Defendant asked her thereupon what she meant, and prosecutrix replied that she was a stenographer looking for employment. Defendant then said to her, "If you are looking for employment you can come out to my house to work;" advising her that her house was in St. Charles, Missouri, and that in order to reach there prosecutrix should take a Wellston car, get off at the end of the line and go into a candy kitchen located there and say she was going to Julia Corrigan's house and that car fare would thereupon be given to her. Prosecutrix did not at the time accept this offer, but within a few days thereafter, namely on Wednesday, December 4, 1912, she left her home, went down town in the city of St. Louis, there took a Wellston car, rode to the end of the car line, made inquiry at the candy kitchen, where she received twenty-five cents from a Greek in charge of the store. She then took a car to St. Charles and went to the house of defendant, which the proof shows to have been at the time, and since, and for a long time prior, a house of prostitution, wherein she was admitted by the defendant, who took her into a room, took her outer clothing off, put a short apron on her and told her she

must get used to everything, as defendant was later on going to send her to Jefferson City where she likewise had a house.

In the house of defendant there were, besides prosecutrix, five or six other girls. This house contained a dance hall with benches about the wall and was furnished with an electric piano. In this hall while prosecutrix remained at defendant's house, the girl inmates and divers men who came there, engaged in dancing. On Friday morning, December 6, 1912, following the advent into this house of prosecutrix, a roughly dressed man, partially drunk, and whose name is unknown, came to defendant's house and she sent him up to a bedroom. Defendant then sent prosecutrix up to this room, where the latter received two dollars from the man. Prosecutrix was then sent back to this room by the defendant and the man therein threw prosecutrix upon the bed and had forcible sexual intercourse with her. The details of this rape are shown in full and at length in the record. To the admission of these details as well as to the fact of rape, defendant strenuously objected and now makes serious contention that such admission is reversible error.

From the intercourse had with this strange drunken man prosecutrix contracted a serious sexual disease, although some considerable effort was made upon the trial to show by a physician, one Dr. Fiegenbaum, who examined and prescribed for prosecutrix, that her infection with this disease could not have occurred at the time of her intercourse in the house of defendant, but that she must have been infected prior to her going to defendant's place.

On the following day the mother and father of prosecutrix having learned that she was at St. Charles in the house of defendant, went out there, found her and took her back home.

The testimony offered by the State as tending to prove that defendant's house was a house of prostitu-

tion both prior, at the time and after prosecutrix went there, though denied by defendant, is abundant, and by palpable inference is admitted by defendant herself in her testimony. We need not, therefore, set out the details of proof showing such character of defendant's house.

One P. L. Rupp, a deputy sheriff, was offered by the State for the purpose of showing that defendant's house was being operated by her as a house of prostitution some two or three weeks subsequent to prosecutrix being taken from there. Objection was made by defendant to the competency of this proof, though the record discloses that all of the testimony given by said Rupp as to the character of defendant's house, consisted in his stating that he as deputy sheriff "went there on January 8, 1913, with the intention of closing it." He does not state what sort of a house it was, nor does the record show whether he closed it or not, except in so far as his language quoted would indicate; and this language by the most obvious inference, indicates that he did not close it.

Testimony on behalf of defendant shows that one Saminos, a Greek employed in the candy kitchen at the end of the car line, gave prosecutrix twenty-five cents to pay her car fare to St. Charles, and that this money had been left at the candy kitchen by defendant with instructions that it was to be given to a little girl who would call for it. The testimony of defendant diametrically contradicts that of prosecutrix as to the manner of, and the inducements which led to the latter's going to the house of defendant, and tends to show that she went accompanied by another girl, one Lillian Cameron. The latter testified for defendant that she met prosecutrix down town in St. Louis on the morning prosecutrix went to defendant's house; that prosecutrix told her she was going out on Lucas avenue to become an inmate of one of the houses of prostitution, which the witness says were then situated on that

street, and requested the said Lillian to accompany her. This the Cameron girl refused to do, but induced prosecutrix to go with her to the house of defendant at St. Charles. There was some corroboration from other witnesses, who ought to have been disinterested, that prosecutrix had gone to defendant's house with the Cameron girl, and had not, as prosecutrix herself swears, gone there alone. This, however, was for the jury and since they evidently found *contra*, we need not follow it further.

Defendant testifying for herself denied that she ever saw prosecutrix until the latter came to her house in St. Charles on the morning of the 4th of December, accompanied, defendant swears, by the Cameron girl; that the two girls advised her that they would like to board with her for a week or two; defendant asked, "Who is this little girl?" referring to prosecutrix, and was told that her name was Ruth Roberts. Defendant then said that she didn't like to do anything like that, "*this little girl looks too young.*" Defendant also denied that her house was, or had ever been a house of prostitution, or that she had ever been a sporting woman, or that she had ever sent prosecutrix to a room with any man, as shown by the State, or that any man had intercourse with prosecutrix while the latter was in defendant's house. In the cross-examination of defendant she was asked over the objections and exceptions of her counsel, whether she had ever kept a house of prostitution in Jefferson City. She denied that she had ever done so and contradicted in this behalf the testimony of prosecutrix and another witness. Defendant was also asked in her cross-examination if she had not kept a house of prostitution at Columbia, Missouri. This she likewise denied; but to this question and answer neither an objection nor an exception was lodged.

In rebuttal the State, over the objections and exceptions of defendant, introduced testimony to show

the good reputation of the prosecutrix for chastity and virtue. In the court's instructions he limited the probative effect of this evidence to a consideration thereof by the jury for the purpose of determining prosecutrix's credibility alone. Defendant asked the following instruction, to-wit:

"The court instructs the jury that if they believe from the evidence in this cause that the witness, Rosa Routhiser, went out to St. Charles to the house of the defendant, Julia Corrigan, with Lillian Cameron under the circumstances and conditions testified to by said Lillian Cameron, then they shall return a verdict finding the defendant not guilty."

This statement of the facts will, we think, serve to make clear such points as we find it necessary to discuss in the subjoined opinion.

OPINION.

Many reasons are urged upon us for the reversal of this case. In the last analysis we may tabulate these generally under three heads, with subdivisions thereof, viz.: Alleged error: (1) in refusing to give the instruction offered by defendant, which we have set out in the statement; (2) in failing to instruct on all of the law of the case, and (3) in the admission of testimony: (a) in the unwarranted cross-examination of defendant; (b) of the sheriff, that the defendant ran a house of prostitution in January, 1913, at the identical house and place where prosecutrix was in December, 1912; (c) of the reputation of prosecutrix for chastity, and (d) of the details of the forcible sexual intercourse had with prosecutrix. Let us look at these in their order.

1. It will be noted that in substance this refused instruction tells the jury that if they find that prosecutrix went to the house of defendant with the witness Lillian Cameron under the circumstances testified to by said Cameron woman, the verdict should be not guilty. The brief of learned

Instruction.

counsel for defendant concedes in effect that this instruction as requested was not in proper form, but that the idea of it was a proper matter of defense, which it was the duty of the court to embody in a properly couched instruction to the jury. We think we may safely concede both this concession of fact and this contention of law. It was clearly a most vicious comment on the evidence in the form offered; but a complete defense if the jury believed it to be true. But had not the court in a converse sense already submitted the exact defensive thought of this instruction to the jury? We think that it had when it told the jury that unless they found "that the defendant took Rosa Routhiser away from her father Nathan Routhiser for the purpose of prostitution as mentioned in this instruction, you will find her not guilty." Palpably, if defendant took her away, Lillian Cameron did not and *vice versa*, for there was no proof in the record of any conspiracy, or connection, between the defendant and the Cameron girl till prosecutrix was in defendant's house. We are constrained to disallow this contention.

II. The specific error urged upon us touching the alleged defects in the instructions given by the court is that the court failed to define what constituted a "taking away" of prosecutrix for the purpose of prostitution, within the meaning of the statute.

The pertinent language of the statute which defines and denounces this crime is: "Every person who shall take away any female under the age of eighteen years from her father . . . for the purpose of prostitution . . . shall, upon conviction thereof, be punished by imprisonment in the penitentiary not exceeding five years." [Sec. 4476, R. S. 1909.] The language of the instruction number one given by the court *nisi*, read upon this point, thus: "If . . . you believe and

Instruction:
No Definition
of Taking
Away, Etc.

find from the evidence that . . . the defendant Julia Corrigan did unlawfully and intentionally take one Rosa Routhiser away from her father, one Nathan Routhiser, for the purpose of prostitution, by having illicit intercourse with divers men," etc. It will be seen that the instruction followed the language of the statute which defined the offense. Was it here required to go further and define the words which defined the offense? Reverting for a little more light to the facts in proof, we note that defendant at Schaper Brothers in St. Louis, late in November, 1912, met prosecutrix and asked her if she wanted a position; prosecutrix said she did and was willing to do almost anything. Defendant inquired what her answer meant, and prosecutrix said to her she was a stenographer, looking for work. Defendant then said, "If you are looking for employment you can come out to my house to work," and continuing gave prosecutrix information as to where the the house of defendant was and how to reach it and offered to and did provide car fare for her by leaving with a man in a candy kitchen at the end of the Wellston car line, twenty-five cents to be given to prosecutrix when she asked for it. Prosecutrix on December 4th, following, left home, got the car fare left by defendant with the candy kitchen man at the end of the car line, went to St. Charles and to the house of the defendant and was received therein as an inmate. This evidence in our opinion fully met the requirements of the statute as to what constitutes a "taking away" within the purview thereof. Raising without the necessity of again deciding (*State v. Miller*, 93 Mo. 263; *State v. Frank*, 103 Mo. 120; *State v. Murphy*, 118 Mo. l. c. 16) whether where an offense is defined by statute in words which are not technical and which are to be understood in their plain and ordinary meaning, the court *nisi* must yet define these words which define the offense, we are yet fully convinced that in no way were defendant's rights prejudiced by

the failure of the court here to tell the jury that "in order to constitute a taking by the defendant under the law, it is not necessary that the defendant should have used any force or have exercised any physical control over the girl in taking her away, or have been personally with her at the time of her leaving, or have gone in person with her; it is sufficient if defendant procured or caused her to go away by any persuasion, enticement or inducement offered, exercised or held out by defendant to the girl, or by furnishing her the means or money with which to go away. It is not necessary that the persuasion, enticement or inducement should have been made or offered or the money or means furnished, at the time of the girl's leaving; but if the defendant, for the purposes charged, persuaded or enticed or offered inducements to the girl to leave her father and furnished her means with which to go away and she did not go away at that time, but went away at a subsequent time, and such going away was caused by and was the result of the persuasion, enticement or inducements offered or money or means furnished by the defendant, such facts would show a taking away within the meaning of the law." [State v. Bussey, 58 Kan. 679.]

If some such instruction as the above had been given for the State we must needs have held it good upon the statute and the facts here, but we opine that the defendant would have objected strenuously to its being given. As the matter was left by the court the jury might well have been led to believe that either physical control and personal presence and a present, as distinguished from a future, going away was an absolute prerequisite to conviction. Be all this as may be we are not able to perceive wherein the omission of the court to define "taking away" as such taking away was shown by the proof here, harmed defendant. On the contrary, a proper definition running with the facts would in our judgment have hurt her case with the

jury, and the failure to define these words might well have aided her case. It is of no legal force, that the sequel shows that it did not help the case.

III. Which brings us to alleged error predicated upon the admission of incompetent evidence for the State. The first complaint made is that the State was allowed by the trial court to cross-examine the defendant, who took the stand in her own behalf, as to her running and having houses of prostitution in Columbia and in Jefferson City. Clearly this was not mentioned by her in her examination in chief. So it is error and presumptively hurtful to her case. Pretermittting the statutory permission to impeach a defendant who takes the stand "as any other witness in the case" (Sec. 5242, R. S. 1909), and the well-settled means of impeachment by showing by the accused himself, practically always *dehors* his or her examination in chief, the fact that he or she has been convicted of some crime (State v. Blitz, 171 Mo. 530), were these questions harmful to defendant here? We think not. She denied having such houses, or having had houses of prostitution in either Columbia or Jefferson City. The prosecutrix had already sworn that defendant told her that she had a house of this character in Jefferson City. These questions gave the defendant the opportunity to deny the testimony in this behalf of the prosecutrix and thus to blunt the force of any comment which the State might make in argument, and any inference which the jury might have drawn from defendant's silence. [State v. Larkin, 250 Mo. 218.] If defendant had admitted that she had, or had run such a house in Jefferson City, a different case would be before us.

To the inquiry as to defendant's having a house of prostitution in Columbia neither objection was made

nor exception saved by her; so we need not consider this.

IV. The deputy sheriff was permitted to swear over defendant's objection that as such officer he went to the said house of defendant in January, 1913, "with the intention of closing this house." He nowhere says whether he closed it or not; nor does he say what sort of house it was.

**Evidence of
Subsequent
Matters.**

For aught that appears to the contrary in this record, though he went for the purpose of closing it, the benevolent and beneficent character of it, upon a closer and more careful scrutiny, may have worked upon this officer in such wise as to have stayed his intention. At any rate his intention was stayed; inferentially, he did not close it, and he gives no reason for not doing so. Conceding that the mental attitudes and intentions of the sheriff and his deputies are in no way binding upon the defendant, and that the question was highly improper, we are still not able to see how she was hurt in any way by his answer. All presumptions of right, legal and proper action being indulged in favor of the view that this officer did his duty, we are confronted then by the conclusion that if this house was in January, 1913, being operated by defendant as a house of prostitution, the officer would have closed it and would not upon a more intimate examination have abandoned his intention so to do. Being forbidden by the authorities to reverse a case for innocuous error, or error helpful and not hurtful to defendant, we disallow this specific contention. [State v. Thornhill, 174 Mo. 364; State v. Hunter, 181 Mo. 316.]

V. Complaint is likewise lodged that evidence of the prior good reputation of prosecutrix for chastity was admitted by the court to bolster up her reputation, before the defendant had attacked it. If this were

Good
Reputation of
Prosecutrix:
Testimony of
Specific Acts.

true upon the record it is error, and we must reverse this case. But the record shows that while much evidence was offered by the State to bolster up prosecutrix's reputation, all such offerings were in rebuttal, and made after the defense had strenuously sought to show by cross-examination of the witness Dr. Feigenbaum, that prosecutrix, an unmarried girl, had contracted or must have had a revolting sexual disease before she went to the house of defendant; and likewise after the witness Lillian Cameron had sworn that prosecutrix had importuned her to go with prosecutrix to a house of prostitution on Lucas avenue in St. Louis and become an inmate thereof. Manifestly, testimony of this character was just as surely, and more seriously, an attack upon the reputation of prosecutrix for chastity as would have been the offering of character witnesses to show her evil reputation in that behalf. In the light of such an attack the State in rebuttal was permitted to offer countervailing testimony of prosecutrix's good reputation. [State v. Speritus, 191 Mo. 24; State v. Jones, 191 Mo. 653; State v. Maggard, 250 Mo. 335.] Both in reason and upon authority, this contention is not tenable upon the facts in this case.

VI. This brings us to the last and most serious contention of defendant, viz.: that it was error, greatly harming defendant's case and accounting by patient inference for the extreme penalty of the law which the jury inflicted on her, to permit prosecutrix to relate before the jury the revolting and heinous details of the rape committed on her by the unknown drunken visitor at defendant's house. The point is a new one in this State.

Res Gestae:
Affecting
Accessory:
Rape:
Prostitution.

Going back as a basis for some of the things which we shall say, we observe that it is well-settled that under our statute defining this offense, the gravamen

of the charge is the purpose or intent with which the "taking away" is accomplished. [State v. Adams, 179 Mo. 334; State v. Richardson, 117 Mo. 586; State v. Knost, 207 Mo. 18; State v. Beverly, 201 Mo. 550; State v. Baldwin, 214 Mo. l. c. 308.] Intent is a hidden mental process, deducible in a criminal case especially, since the State may not use the defendant to prove it, from words or overt acts alone. We do not find here in this record, nor would we ordinarily expect to find in any record, any language of the defendant clearly stating or admitting that the intent in taking away a girl under the age of eighteen years, was for the purpose of prostitution. This intent, which the cases hold is the gist of the offense, must then of necessity be inferred or deduced from other facts or acts in proof, just as in a sense we reason in cases of circumstantial evidence alone. That prosecutrix was taken for the purpose of prostitution can in no way be more clearly or conclusively shown than by the fact that she was received into a house of prostitution, kept there by the defendant and when occasion offered sent by the defendant to a room with a man who gave her money and had sexual intercourse with her. So far and to the extent that *voluntary* sexual intercourse may be shown as an act from which the intent of prostitution may be deduced, we do not understand defendant as contending. The law to this extent is well-settled at any rate. [State v. Johnson, 115 Mo. 480; State v. Bobbst, 131 Mo. 328; 1 Cyc. 158.] The admissibility of the fact of voluntary intercourse for the purpose of showing intent being thus settled by the ruled cases, does it lie in the mouth of defendant to object to the fact of that rape, or to the details thereof, however heinous, which it became necessary to perpetrate on the prosecutrix in order to accomplish that identical intercourse, for which defendant received the price and for which she sent prosecutrix in unto the drunken man? We think not, and we know of no rule of law

or logic which would so hold. This identical question was before the Court of Appeals of New York in the case of Schnicker v. People, 88 N. Y. 192, which was a case almost on all-fours with the facts here. There it was held that the details of the force used in consummating the sexual acts, were parts of the *res gestae* and admissible against the defendant, though done out of her immediate presence and not specifically commanded by defendant to be done. The point is akin to that which holds an accessory before the fact liable, when the principal by instigation of an accessory robs another and in that robbery, to accomplish it, commits murder. [State v. Rader, *ante*, p. 117.]

So, while it is probable that a part of the extreme penalty visited upon defendant is attributable to the fact that the sexual intercourse with prosecutrix for which defendant sent her in unto the drunken man to be consummated, and for which defendant received the price, was accomplished with force, this is but one of the misfortunes directly arising from her own criminal machinations, and is a part of the *res gestae*. Acts which are *res gestae* are always admissible, even though they may show the commission by defendant of another crime or other crimes. [State v. Anderson, 252 Mo. 83.] Therefore we disallow this contention.

Having thus examined all of the points made by defendant and finding neither in them nor in the record any reversible error, and being thoroughly convinced of the guilt of defendant, we affirm the case. Let this be done.

Walker, P. J., and Brown, J., concur.

THE STATE v. CHES. CURTNER, Appellant.

Division Two, November 24, 1914.

1. **ASSAULT: Decree: Instruction.** Section 4482, Revised Statutes 1909, does not purport to include any class of assaults except those for which no punishment has been prescribed by preceding sections, and as the crime of assault with intent to kill by shooting at a human being is specifically prohibited and the punishment therefor prescribed by section 4481, it is not error to decline to instruct upon the crime of assault denounced by section 4482 where defendant is charged with the offense denounced by section 4481.
2. **IMPEACHMENT OF WITNESS: Statement out of Court.** Statements made by a witness out of court in conflict with his testimony for the State cannot be used to contradict or impeach the witness unless he is asked while giving his testimony if he made the alleged contradictory statements.
3. **EXCLUSION OF EVIDENCE: Cured by Subsequent Examination.** Error in excluding evidence of the details of a difficulty between defendant and the prosecuting witness prior to the shooting, is cured by the adroitness of defendant's counsel in eliciting from the witnesses offered the full details of the prior difficulty.
4. **EXHIBITING WOUNDS TO JURY.** It is not error to permit the prosecuting witness to exhibit his wounds to the jury, in a prosecution for assault with intent to kill by shooting with a shotgun, whereby said witness lost his eyesight. Such evidence may tend to create prejudice in the minds of the jury, but they have a right to know the result of the assault as an aid in arriving at the proper punishment to be fixed.
5. **EXCESSIVE PUNISHMENT.** A verdict assessing defendant's punishment at seven years' imprisonment in the penitentiary for an unprovoked assault with intent to kill, where after a quarrel in the public road with the drunken prosecuting witness he bought shells, borrowed a shotgun, and shot him in the face, as a result of which he lost his eyesight, does not indicate such malice or prejudice on the part of the jury as authorizes a new trial.

Appeal from Pemiscot Circuit Court.—*Hon. Frank Kelly, Judge.*

AFFIRMED.

A. L. Oliver for appellant.*John T. Barker*, Attorney-General, and *W. T. Rutherford*, Assistant Attorney-General, for the State.

(1) When an instruction is desired on a particular subject, the trial court's attention should be directed specifically to its failure to instruct thereon. *State v. Groves*, 194 Mo. 458; *State v. McCarver*, 194 Mo. 742; *State v. Conway*, 241 Mo. 288. (2) This court cannot review instructions if no exception is saved at the time by the defendant to action of the trial court in overruling his motion for a new trial. *State v. Penland*, 199 Mo. 154; *State v. Irwin*, 171 Mo. 558; *State v. Harvey*, 105 Mo. 316. (3) Where, as in this case, the evidence on the part of the State, if true, shows an assault with intent to kill, with malice aforethought, and the evidence of defendant, if true, establishes a case of self-defense it is not error to fail to instruct on a lower grade of assault. *State v. Rohb*, 90 Mo. 34; *State v. Schloss*, 93 Mo. 366; *State v. Musick*, 101 Mo. 270; *State v. Doyle*, 107 Mo. 42; *State v. McGuire*, 113 Mo. 675; *State v. Johnson*, 129 Mo. 30; *State v. Barton*, 142 Mo. 455; *State v. Grant*, 144 Mo. 67; *State v. Drumm*, 156 Mo. 220; *State v. Higginson*, 157 Mo. 402; *State v. Bartlett*, 209 Mo. 406; *State v. Myers*, 221 Mo. 615. (4) It was competent to show that there had been a former difficulty between the parties, but the details thereof, are not admissible. It is not competent to go into the character of a difficulty so far removed from the difficulty as to be a separate one. Threats made during a prior difficulty are admissible. *State v. Hale*, 238 Mo. 508; *State v. Birks*, 199 Mo. 275; *State v. Heath*, 237 Mo. 272; *State v. Heath*, 221 Mo. 595. (5) Threats made by defendant against the prosecuting witness are competent to show malice

on the part of defendant toward the witness at the time of the shooting. *State v. Whitsett*, 232 Mo. 528; *State v. Bailey*, 190 Mo. 284. (6) Appellant in this case was guilty of an assault to kill and it is a great wonder that a more severe punishment was not assessed against him. He made preparation to kill the prosecuting witness, and had the shotgun been charged with larger shot, would undoubtedly have succeeded.

BROWN, J.—Adjudged to serve a term of seven years in the penitentiary for assaulting with intent to kill one Lonnie Howell, defendant appeals to this court.

On February 9, 1912, defendant met Lonnie Howell and his father-in-law, Bud Rockett, at the town of Braggadocio, Missouri. All these parties lived on nearby farms and had walked to town. A heavy snow was falling.

Howell and Rockett became drunk and talked and acted boisterously. They engaged in a quarrel with defendant because the latter made some remark about their being drunk when one of them fell in the snow.

Howell cursed defendant and threatened to shoot him unless he shook hands and made friends. There is no evidence that any of the parties were armed at that time, though there is some evidence that Howell placed his hand in his pocket as if to draw a revolver at the time he made the threat before mentioned. After shaking hands with defendant, Howell and Rockett started home slowly, staggering along the road arm in arm.

According to the testimony on behalf of the State, as soon as Howell and Rockett left town, defendant, who was sober, went into a store and called for shotgun shells; on being informed that the merchant had none except those loaded with number eight shot, defendant remarked that he wanted larger shot, but, being in a hurry, would take ten cents worth of the shells

offered to him. He received three shells loaded with number eight shot.

Immediately after procuring the shells defendant went to the home of his sister, a few blocks distant, to borrow a gun. To her he was heard to say, "I'll shoot him if I have to borrow a gun." Failing to procure a gun at the home of his sister, defendant visited two other parties in Braggadocio, where he made unsuccessful attempts to borrow a shotgun.

He then followed Howell and Rockett down the road at a rapid gait. While Howell and Rockett were walking around a wagon which they met in the road, defendant, apparently unobserved, ran around the opposite side of the wagon and got ahead of them.

After going a short distance further defendant went into the home of one Hatley, where he again asked to borrow a shotgun. Hatley's boy replied that he had a Winchester shotgun, but that he intended to use it hunting rabbits as soon as he could go to town and get some shells. To this statement defendant replied that there was a rabbit out on the road between Hatley's house and town which he wanted to kill.

Defendant and young Hatley then loaded the shotgun with defendant's three shells and started to town, Hatley carrying the gun. After going a very short distance they met Rockett and Howell, and, when they were about thirty feet from the latter, defendant took the gun from the Hatley boy, and, without saying a word, shot Howell in the face, inflicting severe wounds and completely destroying his eyesight. Howell testified that he had his hat pulled down over his eyes to keep out the drifting snow and did not know that defendant was within a mile of him when the gun was fired. Defendant testified that just before he shot Howell the latter ran his hand in his hip pocket and said, "I'll get him now." There was some evidence tending to corroborate defendant, but the great pre-

ponderance of testimony indicates that the shooting was done deliberately and without provocation.

Defendant's counsel has not favored us with a brief, but an inspection of the record discloses the fact that he relies for reversal upon alleged errors herein-after noted.

OPINION.

I. Defendant insists that the court erred in not instructing the jury upon the crime of assault as denounced by section 4482, Revised Statutes 1909. That section does not purport to denounce any class of assaults except those for which no punishment had been prescribed by preceding sections of the statute, and as

Degree of Assault. the crime of assault with intent to kill by shooting at a human being had been specifically prohibited, and a punishment therefor prescribed by section 4481, the court properly refused to instruct the jury that they might find defendant guilty under any other section of the statute or of any other class of assault. Under the evidence he was either guilty as charged under section 4481, or his act was justified on the ground of self-defense.

II. Defendant also complains that error was committed in excluding evidence tending to prove that the State's witness Rockett had made statements out of court which conflicted with his testimony

Witness: How Impeached. as given upon the trial. This evidence was properly excluded, because the witness thus sought to be impeached had not, while giving his evidence, been asked if he made the alleged contradictory statements. [Kelley's Criminal Law and Procedure (3 Ed.), sec. 385; 1 Greenleaf on Evidence (15 Ed.), sec. 462; State v. Devorss, 221 Mo. 469, l. c. 474.]

III. A further assignment of error relates to the action of the court in excluding evidence of the details of a quarrel and difficulty which occurred between defendant and the prosecuting witness on the day the shooting occurred. If the exclusion of this evidence was error it was completely cured in a subsequent part of the trial by the adroitness of defendant's learned counsel in eliciting from the witnesses offered the full details of the prior difficulty. [Hamilton v. Rich Hill Mining Co., 108 Mo. 364; Olfermann v. Union Depot Ry. Co., 125 Mo. 408.]

IV. It is further urged that the court erred in permitting the prosecuting witness to exhibit his wounds to the jury—defendant having objected to this exhibit on the ground that it had a tendency to prejudice the jury. While such evidence did tend to create prejudice, as it apprised the jury of the result of defendant's crime, it was properly admitted. In Wharton's Criminal Evidence (10 Ed.), vol. 2, sec. 518c, the rule is announced thus:

“The authorities are abundant that . . . parts of the deceased may be shown, such as the skull, jaw-bone, that may illustrate the nature of the wounds and identify the assailant, or the instrument, where that is essential. Not only the clothing may be exhibited, but it may be arranged upon a frame for convenience in exhibiting it to the jury, and structures and diagram of location may all be used as an aid in determining the charge under trial.”

A court or jury would be justified in imposing a more severe punishment where the assault was committed with such cruelty or deliberation as to result in severe injury to the person assaulted than in cases where the assault was carelessly made and resulted in no injury. The jury had a right to know the details of the assault and the result thereof in determining

whether to impose the minimum penalty (two years) or a more severe sentence.

V. Defendant also insists that the seven-year sentence given him indicates malice or prejudice on the part of the jury, but we think this complaint is unfounded. The maximum punishment for the crime of which he was convicted is ten years, and, if the jury believed the State's witnesses as to the unprovoked character of the assault, and they did so or they would not have convicted defendant, it was a matter of compassion on the part of the jury that he did not receive a ten-year sentence instead of only seven years. We have searched the whole record and find no reversible error, therefore the judgment of the trial court will be affirmed.

Walker, P. J., concurs; *Faris, J.*, does not sit.

THE STATE ex rel. GEORGE L. FRAZER et al., v.
WILLIAM J. SEIBEL, County Clerk.

THE STATE ex rel. W. H. TEGETHOFF v. WIL-
LIAM J. SEIBEL, County Clerk.

THE STATE ex rel. A. H. WERREMEYER v. WIL-
LIAM J. SEIBEL, County Clerk.

In Banc, December 1, 1914.

1. **ELECTION: Coalition of Parties: Printing Names on Different Tickets.** The Act of 1913, prohibiting party fusion and denying to a candidate of one political party the right to have his name also printed on the party ticket of another political party as its candidate for the same office, having been held unconstitutional (261 Mo. 515), the county clerk has no power to refuse to print the name of a candidate for Representative upon the tickets of two political parties, where he has been nominated at a primary election by one of such parties, and substituted by the county committee of the other in the stead

State ex rel. v. Seibel.

of its own candidate for the same office who has resigned. The statutes as they now stand do not prohibit a man from being the candidate of two political parties.

Held, by GRAVES, J., dissenting, with whom WOODSON, J., concurs, that the Act of 1913 prohibiting fusion of political parties, is not unconstitutional, as *held* in *State ex rel. Schmoll v. Drabelle*, and whether it received the number of votes required by the Constitution was a question for the legislative body to determine, and that act being valid the peremptory writ of mandamus should be denied.

2. ———: ———: ———: **Sec. 5848, R. S. 1909: Not Question for County Clerk.** It is not for the county clerk to determine that the attempted substitution upon its party ticket of a candidate of another party for the same office, by the county committee, in the stead of its own nominee who has resigned, is in violation of Sec. 5848, R. S. 1909, providing that "no committee shall have the power to substitute, to fill any vacancy, the name of any person who is not known to be of the same political belief and party as the person for whom he is substituted." That section lays a duty upon the party committee, but it lays none on the county clerk, and it does not authorize him to exercise the judicial function of saying that the person substituted is known not to be of the same political belief and party as the person for whom he is substituted.
3. ———: **Candidates: Payment of Filing Fee.** *Held*, by BROWN, J., that a county clerk cannot refuse to print the name of a candidate for office on the party ticket on the sole ground that he had not paid the filing fee to the committee treasurer required by Sec. 5879, R. S. 1909. Said requirement is violative of the constitutional provision (Art. 2, sec. 9) ordaining that "all elections shall be free and open." That provision applies to both candidates and voters. Such a statute is against sound public policy.

Mandamus.

WRIT ALLOWED.

Albert Chandler and Wilfred Jones for relators.

A. E. L. Gardner for respondent.

LAMM, C. J.—The three cases entitled as above are original proceedings in mandamus. They have a common purpose, were heard as one and decided as one

by a *per curiam* handed down on October 31, 1914. If fresh justice is the sweetest as Lord Bacon says it is, that *per curiam* filled the bill. It, *inter alia*, ordered that absolute writs issue and that an opinion follow. The opinion so ordered to follow, follows, thus:

The object of the alternative writs was to cite Seibel, clerk of the county court of St. Louis county (who was either recalcitrant, or *dubitante*, or both) to show cause, if any he had, why the names of relators Frazier and Morgan should not be printed on the official ballot for use in the then approaching State election as candidates of the Progressive party for the offices of State representative for the second district and judge of the county court for the first district in St. Louis county respectively, in lieu of one Mars and one Gardner who had resigned their primary nominations respectively for those offices on the Progressive party ticket; and have the same clerk show similar cause, if any he had, why the name of relator Tegethoff should not be printed upon the official ballot as the candidate of the Progressive party for the office of State representative for the first representative district of said county in lieu of one Morton, who had resigned his primary nomination for that office on the Progressive party ticket; and have the same clerk show similar cause, if any he had, why the name of A. H. Werremeyer should not be printed upon the same official ballot as the candidate for the office of collector of revenue upon the Democratic ticket, in lieu of one Gillick who had resigned his primary nomination for that office on the Democratic party ticket.

To those alternative writs, Seibel made return in the Werremeyer case which, by consent, stood as a return to the others, *mutatis mutandis*.

In substance, so far as material here, the return was to the effect that Werremeyer was nominated at the prior August primary as the candidate of the Progressive party for the office of collector of revenue,

and Gillick was similarly nominated as the candidate for the same office on the Democratic ticket. That Werremeyer had not withdrawn as a candidate upon the Progressive ticket, but holds fast to that nomination, while at the same time endeavoring to get the nomination of another party and to have his name printed on the ticket of that other party by and through the resignation of Gillick and a resolution of the Democratic central committee of St. Louis county. That he, Werremeyer, was not known to respondent nor to said Democratic central committee, nor to the voters of said St. Louis county to be a Democrat in belief, nor as affiliated with the Democratic party, nor was he known to be of the same political belief or party as said Gillick; but, *contra*, was known to respondent, to said committee and to said voters as a member of the Progressive party and as a believer in its principles. That the said action of the Democratic central committee (set forth in full in resolutions in the record) was contrary to the provisions of Revised Statutes 1909, section 5848.

It seems that relators in the other causes were the regular nominees of the Democratic party, under circumstances outlined above, for the offices indicated hereinbefore, and sought nominations from the Progressive party and to be put on the Progressive party ticket by virtue of the resignations of the named candidates of the Progressive party for the offices in question, and to run on both tickets.

Relators filed a motion for judgment, and, on precedent, it is our view that the issue, raised by such motion for judgment on the pleadings, is one of law alone.

On such record, no apparent useful purpose can be subserved by extended discussion; since the principles controlling the case have been lately announced by this court, thus: In *Nance v. Kearbey*, 251 Mo. 374, an election contest, decided in 1913, the validity of Kearbey's election for sheriff was questioned in

part on the ground that his name improperly appeared on two tickets. We resolved the case against the contention of contestant, putting our ruling in main part on the doctrine of *State ex rel. v. Kortjohn et al.*, 246 Mo. 34, decided in 1912. One phase of the Nance-Kearbey case rode off on the assumption there was no existing statutory inhibition against two political parties doubling up their forces at an election and running the same candidates upon their two tickets if the coalition was regularly brought about. [*Williams v. Dalrymple*, 132 Mo. 62.] In 1913 the Legislature attempted a change in public policy in that particular. [Laws 1913, p. 327.] The new act prescribed a blanket ballot, containing, also an antifusion provision, whereby a candidate was denied the right to coquette with and embrace two nominations at the same time. [Laws 1913, sec. 5891, p. 327.] Now, in *State ex rel. Schmoll v. Drabelle et al.*, Board of Election Commissioners of the City of St. Louis, 261 Mo. 515, it was held that this Act of 1913 was not enacted in accordance with the safeguards and requirements of the Constitution. By that decision that act, apparently the only recognized barrier in the way of fusion on candidates, was struck to the ground and became the same as if it never had been. Hence, as to the law of the instant cases, the situation is precisely as it was when the Nance-Kearbey case and the Williams-Dalrymple case were ruled, namely, political parties were allowed to fuse by nominating the same candidates and, to that end, filling vacancies on their tickets occurring after primary nominations. It becomes evident, then, that on the authority of the cases cited, absolute writs were providently awarded unless there is something of substance in respondent's contention that section 5848, Revised Statutes 1909, stands as a lion in the way. Attend to that section. It reads: "The central committee of a political party shall consist of the largest body elected for the purpose of representing and acting for the party in the interim

between conventions of the party. That for the purpose of making nominations to fill vacancies on a ticket previously nominated a majority of all the members-elect of a central committee shall be necessary to take action. That a central committee shall not have the power to delegate its authority to make nominations to any persons or number of persons, and that any act consequent upon any such delegation of authority shall be held to be null and void. That no central committee shall have the power to substitute, to fill any vacancy, the name of any person who is not known to be of the same political belief and party as the person for whom he is substituted."

We are of opinion that respondent county clerk, neither by name, office nor intendment is within the purview of that section, hence, has no call or right to invoke its provisions in showing cause in his return. That section laid no duty on him. It laid a duty on the central committee of the party. Whether a violation of that duty is to be corrected by electors at the polls when chance offers or can be corrected by the courts in an appropriate and timely action, we need not decide. It is enough for us to hold that it will be time enough for county clerks to constitute themselves judges of the delicate question of the political beliefs of candidates when the lawmakers say so, not before.

The next section of the statute (Sec. 5849) prescribes a method of testing out objections to certificates of nomination—a method held preclusive in the Nance-Kearbey case. It is not pretended in these cases that any steps were taken under section 5849 to obtain any relief provided for therein.

It is on such premises, I am instructed by a majority of the Brethren to say that our absolute writs were awarded at the hearing by a *per curiam*, were served *instantly* and became effective.

All concur, except *Woodson* and *Graves, JJ.*, who dissent in an opinion by *Graves, J.*, in which *Woodson, J.*, joins.

BROWN, J. (concurring).—I concur in the views expressed in the majority opinion by our learned Chief Justice, but there is another issue tendered by respondent's return which should not be passed over in silence.

In said return it was asserted that relator Werremeyer was not entitled to have his name printed upon the ballots of the Democratic party because he had not paid the filing fee to the Democratic Central Committee, as required by section 5870, Revised Statutes 1909. In response to this defense it was urged by our learned Attorney-General that the failure of the relator to pay the filing fee is no defense in this case, because the law requiring such fee to be paid is in violation of section 9, article 2, of our Constitution, which, among other things, ordains that "all elections shall be free and open." In this contention the Attorney-General is correct.

The "free and open" clause of our Constitution is intended to have some application to both candidates and voters. With such restrictions as will demonstrate that a reasonable number of persons desire to vote for a candidate he should be allowed to aspire to public office and submit his claims to the voters.

Sections 5860 and 5870 of our primary election law require candidates for public office to pay sums of money into the treasury of the political party on whose ticket they wish to be nominated before their names can appear upon the ballots of that party. To my mind such laws are against sound public policy. The State is friendly to all political parties, but upon no theory of honesty or fairness can it have a desire to

promote the *financial welfare* of any political organization.

In a recent case of this character arising under the Constitution of Illinois (which is in almost the precise language of our own organic law so far as it pertains to elections), it was held by the highest appellate court of that State that a primary election law was void because it required candidates for office to pay sums of money into the public treasury, thus putting a cash price on the right of a citizen to aspire to office. [People ex rel. v. Board of Election Comrs., 221 Ill. l. c. 21-23.]

If our own primary law were as good as the one condemned by the highest court of Illinois I should hesitate to enter my protest against its enforcement, for it is well known that if the money required by our law to be paid to political committees by candidates were paid into the public treasuries of the several counties and cities of our State the cost of holding our biennial primary elections would be lifted from the shoulders of the taxpayers and placed upon the candidates, and thus the public treasuries would gain many thousands of dollars.

Just think of the great State of Missouri requiring the payment of sums of money (vast in the aggregate) to the treasurers of political parties to be used in promoting the election of persons who happen to be nominated, and, perchance, to be used in corrupting the electorate into voting for candidates who may or may not be worthy of the offices to which they aspire. Such a law is enough to make every honest man in our State hide his face with shame.

The primary election law we now have is obviously intended to help the party which is temporarily in the ascendency. It no doubt helps the Republican party in St. Louis county, for by the election returns we see that the Republican candidates usually win in that particular county; consequently, many persons will seek

nominations on that ticket and pay money to the treasurer of the Republican committee of that county for the chance of being nominated. It helps the Democratic party in Monroe county, and probably helps the Progressive party in Mercer, but it hurts minority parties everywhere, because it discourages persons from becoming candidates upon the ticket of a minority party, however much their views may be in accord with its principles, and to that extent at least it impedes the "free and open" elections which are contemplated in our Constitution. Under the guise of law it takes money from candidates all over the State, which, if collected at all, should be paid into the public treasuries of the several counties and cities, thereby relieving taxpayers who have quite enough burdens to bear without carrying the expense of primary elections.

Entertaining these views, I hold that those provisions of our primary election law upon which respondent relies are invalid, and that our absolute writ of mandamus was properly issued.

GRAVES, J. (dissenting).—I dissent from the order and judgment in this case awarding the peremptory writ of mandamus. Under the opinion of the majority of this court in *State ex rel. Schmoll v. Drabelle et al.*, 261 Mo. 515, the writ should go, but I do not agree to that opinion. By that opinion the Act of 1913 prohibiting fusion of political parties was declared unconstitutional. In that my brothers were wrong. By that opinion they emasculated from the Constitution one whole section thereof. Section 37 of article 4 of the Constitution clearly makes the Legislature the forum in which to determine the question as to whether or not all legal and constitutional steps have been taken in the passage of a bill. By this section the determination of this question is taken away from the courts. Grant it that section 31 of the same article requires that a ma-

majority of the members shall vote for a bill before it shall become a law, and that the names of those voting for and against it shall be spread of record, yet under section 37, *supra*, the legislative body determines for itself whether or not these things have been done in the passage of the bill. If such body says, by the signing of the bill in the presence of the body, without objection, that such things duly appear, that is the end of the matter, and this and no other court can go behind such solemn judgment of the legislative body.

Under this view of the law the anti-fusion statute is a valid and binding statute, and for that reason this writ of mandamus should be denied. *Vide* dissenting opinion in *State ex rel. Schmoll v. Drabelle et al.*, *supra*.

Woodson, J., concurs in these views.

JANE E. PRIEST et al., Appellants, v. ABRAHAM
McFARLAND et al.

In Banc, December 1, 1914.

1. **WILL: Power of Disposition: Limitation Over.** Where a life estate is expressly or impliedly created by will or deed, with which is coupled a power of disposition by the life tenant and a remainder in fee to others, the limitation over will take full effect upon the death of the life tenant, unless the power of disposition has been exercised by her in strict accordance with the terms in which it was bestowed. So much of the property as the life tenant has not attempted to dispose of, upon her death vests in fee in the remaindermen named.
2. ———: ———: **Reservation of Life Estate.** The testator devised all his property to his wife, "to be held, owned and enjoyed by her during her natural life with full power to sell and dispose of the same or any part thereof absolutely and at her own discretion and with full power to give a good and perfect title upon sale or other disposition of any or all of my said property" and further provided that "at the death of my said wife whatever of my property or its proceeds may

remain undisposed of by my said wife, shall descend to and be divided between my said children." The wife conveyed the land in suit to two of said children for an expressed consideration of \$6000, reserving to herself a life estate, and providing that the fee should vest in them at her death. They went into possession and accounted to her for rent until her death. *Held*, by a majority of the judges, that the deed should be upheld; that the life tenant could dispose of the fee, and reserve to herself a life estate in the property; though a majority do not agree that she had power to give away the property, but there being evidence that the consideration named was actually paid a majority hold that the judgment of the trial chancellor should be affirmed.

3. ———: ———: Testamentary Deed. A deed which expressly reserves a life estate in the grantor, and conveys at the same time, by words of present import, a vested remainder in the property to the grantees, is not a mere attempt to convey the title by an instrument in the nature of a last will and testament, but is in legal effect a present conveyance of a fixed right, namely, a vested title in fee.

Appeal from Lincoln Circuit Court.—*Hon. James D. Barnett*, Judge.

AFFIRMED.

Ben E. Hulse for appellants.

(1) The evidence as to declarations by Harriet McFarland concerning the consideration for the deed in controversy is *res inter alios acta* as to these plaintiffs, and is not competent as against them. They do not claim in privity with the declarant. Its admission was error. *Brown v. Patterson*, 224 Mo. 639; *Howell v. Sherwood*, 242 Mo. 540; *Davis v. Green*, 102 Mo. 183; *Spradling v. Conway*, 51 Mo. 54. (2) A power to convey the fee given to a tenant for life is a power appendant, and the estate conveyed by the execution of the power must arise partly at least out of the estate for life. A conveyance of the remainder to take effect on the expiration of the life estate is not a valid execution of the power. *Farwell on Powers* (2 Ed.),

p. 9; 2 Washburn on Real Prop. (star), p. 304; 1 Sugden on Powers, p. 107; Garland v. Smith, 164 Mo. 1; Taussig v. Reel, 134 Mo. 544; McFall v. Kirkpatrick, 236 Ill. 281. (3) By the terms of the deed in controversy Mrs. McFarland was to have the land during her life, and it then provided, "and at and after my death then in consideration of the said sum of six thousand dollars, so paid to and received by me as aforesaid, this deed shall become absolute and fully vest the title in fee in said second parties." Such an instrument is not a conveyance, but a mere attempted testamentary disposition of the property, and void. Murphy v. Gabbert, 166 Mo. 596; Miller v. Holt, 68 Mo. 584; Aldridge v. Aldridge, 202 Mo. 565; Givens v. Ott, 222 Mo. 411; Terry v. Glover, 235 Mo. 544; Pinkham v. Pinkham, 55 Neb. 729; Barnes v. Stephens, 107 Ga. 436; Dye v. Dye, 108 Ga. 741; Wynn v. Wynn, 112 Ga. 214; Massey v. Huntington, 118 Ill. 80; Wilenou v. Handlon, 207 Ill. 104; Castor v. Jones, 86 Ind. 289; Matter v. Longer, 108 Iowa, 34. (4) There was no valuable consideration for the deed. It was a mere gift, if anything, and void as an execution of the power. Garland v. Smith, 164 Mo. 1; Scheidt v. Crecelius, 94 Mo. 322. (5) The defendants were the agents of their mother, and had absolute charge and control of her business and lived in the same house with her as one family, they furnishing her out of her own property such pin money and other things as her limited necessities required. The law presumes, in the absence of a showing to the contrary that the deed made by her to them was the result of undue influence on their part over her. Street v. Gass, 62 Mo. 229; Hall v. Knappenberger, 97 Mo. 511; Kincer v. Kincer, 246 Mo. 419; Mowry v. Norman, 223 Mo. 463; Ennis v. Burnham, 159 Mo. 518; Marlin v. Baker, 135 Mo. 504; Kirschner v. Kirschner, 113 Mo. 297; Grundmann v. Wilde, 164 S. W. 200; Wendling v. Bowden, 252 Mo. 647; Gibson v. Shull, 251 Mo. 480.

E. W. Nelson, George A. Mahan, Albert R. Smith, Dulamy Mahan and O. H. Avery for respondents.

(1) There was no error in the admission of testimony as to the declarations of Harriet McFarland. The testimony was admissible on various grounds. (a) Mrs. McFarland was executrix of the Walter McFarland estate. Plaintiffs' attack upon her deed involves more than its mere execution. All her acts relative to and culminating in the execution of the deed are *res gestae*. (b) Plaintiffs at the trial, attempted to show confidential relations between her and the defendants and they still charge undue influence. This charge calls for an investigation of the dealings between Mrs. McFarland and the defendants. (c) The whole series of facts out of which this controversy arose is *res inter alios acta*. All dealings of Mrs. McFarland and the defendants relative thereto are therefore logically and necessarily relevant. (d) Again, the consideration of her deed was called in question and her declarations tending to show a consideration are competent as admissions in favor of these defendants whose position in the transaction was antagonistic to that of Mrs. McFarland. *Eckert v. Triplett*, 17 Am. Rep. 735; *State to use v. Mason*, 112 Mo. 374; *Johnson v. Ice Co.*, 143 Mo. App. 453; *Kingsbury v. Joseph*, 94 Mo. App. 298; *Davis v. Calvert*, 25 Am. Dec. 296; 16 Cyc. 1037; 1 Ency. Evid., p. 569, note 26; *Jones on Evidence* (2 Ed.), sec. 253, note 11; 1 *Greenleaf on Evidence*, sec. 113; *Mechem, Law of Agency*, secs. 714-15. (2) By the terms of her husband's will Harriet McFarland had full power to sell and dispose of the real estate or any part thereof absolutely and at her own discretion and full power to give a good and perfect title upon such sale or other disposition of any or all of the property. *Grace v. Perry*, 197 Mo. 550; *Worden v. Perry*, 197 Mo. 569; *Boyer v. Allen*, 76 Mo. 498; *Underwood v. Cave*, 176 Mo. 18; *Griffin v. Nicko-*

las, 224 Mo. 291; Devein v. Hooss, 237 Mo. 35; Tisdale v. Prather, 210 Mo. 409. (3) This conveyance is not a testamentary disposition of the property but is a good and valid deed. O'Day v. Meadows, 194 Mo. 616; Christ v. Kuehne, 172 Mo. 118; Sneathen v. Sneathen, 104 Mo. 209; Terry v. Glover, 235 Mo. 551; Johnson, Admr., v. Johnson, 32 Ala. 640; Ferris v. Neville, 89 Am. St. 495, note; Wilson v. Carrico, 49 Am. St. 213; Sharp v. Hall, 86 Ala. 110; McDaniels v. Johns, 45 Miss. 641; Dozier v. Tolson, 180 Mo. 546. The deed conveys a present vested interest and is not testamentary simply because the absolute enjoyment of the estate passed is postponed until the death of the grantor. Adams v. Broughton, 13 Ala. 731; Thompson v. Johnson, 19 Ala. 59; Stewart v. Sherman, 5 Conn. 317; Cummings v. Cummings, 3 Ga. 460; Spencer v. Robbins, 106 Ind. 480; Bowler v. Bowler, 176 Ill. 571; Hinson v. Baily, 73 Iowa, 544; Ward v. Ward, 104 Ky. 857; Exum v. Canty, 34 Miss. 569; Hileman v. Bonslaugh, 53 Am. Dec. 474. The mere fact that the grantor reserves in the deed the possession, use, enjoyment, or profits during life does not make the the instrument a will. It is, notwithstanding this reservation, a good and a valid deed. Hally v. Burkam, 59 Ala. 349; Abney v. Moore, 106 La. 131; Bunch v. Nicks, 50 Ark. 367; Moyer v. Kittrell, 29 Ga. 677; Youngblood v. Youngblood, 74 Ga. 614; Goff v. Davenport, 96 Ga. 423; Cates v. Cates, 135 Ind. 272; Saunders v. Saunders, 88 N. W. 329; Love v. Blauw, 61 Kan. 496; Hart v. Rust, 46 Tex. 556; Beebe v. McKenzie, 19 Ore. 296; Wynn v. Wynn, 112 Ga. 214. (4) There is abundant evidence showing a valuable and sufficient consideration for the deed, besides the consideration \$6000 recited in the deed is prima-facie evidence that the amount was paid in some way by the defendants. McCartney v. Finnell, 106 Mo. 445; Burkholder v. Henderson, 78 Mo. App. 287; Cooper v. Deal, 114 Mo. 527:

Taylor v. Crockett, 123 Mo. 300; Eystra v. Capelle, 61 Mo. 578; Rinkel v. Lubke, 246 Mo. 377.

STATEMENT.

This action to quiet title to two hundred and twenty acres of land was begun in 1907. The plaintiffs are some of the children and grandchildren of Walter McFarland who died in 1871, the owner of the land sued for and considerable other lands, after making a will whereby his wife was made sole executrix. After giving one dollar each to seven of his children, and directing a payment of five hundred dollars each to his two remaining children, the will contains the following clauses.

“4th. I give, devise and bequeath all the rest and remainder of my property, real, personal, mixed and of whatever kind to my beloved wife, Harriet McFarland, to be held, owned and enjoyed by her during her natural life with full power to sell and dispose of the same or any part thereof absolutely and at her own discretion and with full power to give a good and perfect title upon sale or other disposition of any or all of my said property, hereby expressing the fullest confidence in my said wife in the management and control of my estate and of her carrying into execution fully all my desires in regard to it.

“5th. It is my will and desire that in the final distribution of my estate all my said children shall be made equal in the amounts which they shall receive therefrom, and that at the death of my said wife whatever of my property or its proceeds may remain undisposed of by my said wife, shall descend to and be divided between my said children in such proportions as will make the amounts which each of my said children shall receive from my estate to be equal in all respects excepting the sum of five hundred dollars to be paid as aforesaid to each of my said children, Mercy

C. Glasscock and William H. McFarland, making the whole amounts to be received by them respectively from my estate to be five hundred dollars in excess of the shares of the others of my said children."

The wife qualified as executrix and took charge of the personal estate amounting to \$3931, and administered it. She also managed the real estate of about 720 acres of land.

In 1883, she executed a warranty deed to defendants (two of her children) purporting to convey to them 220 acres whereon the family residence stood, for \$6000 cash, but reserving to herself a life estate and providing that the fee should vest in said grantees at and after her death.

The evidence tends to show that the grantees (defendants) paid off a deed of trust on the land in the sum of \$2100 and certain indebtedness against their father's estate of about \$3800; that they took possession of the property and accounted to their mother for its rents and provided her with support and maintenance until her death in 1906. After her death the real estate, except that mentioned in the deed to defendants, was vested in fee in the heirs of her husband. Some of these, the present plaintiffs, brought this action to set aside the deed made by the life tenant to the defendants.

After a hearing before the circuit court sitting as a chancellor, the petition was dismissed and plaintiffs duly perfected their appeal to this court.

OPINION.

I.

BOND, J. (After stating the facts as above).—There is no proposition better settled than that where a life estate is expressly or impliedly created by will or deed, coupled with a superadded power of disposi-

tion in the life tenant and a remainder in fee, if that power is not exercised, the limitation over
Will: Life will take full effect unless the power to
Estate: Power dispose given to the life tenant has been
of Disposition. exercised according to the strict terms in which it was bestowed. [Grace v. Perry, 197 Mo. l. c. 562, and cases cited; Armour v. Frey, 226 Mo. l. c. 669; Burnet v. Burnet, 244 Mo. l. c. 505; Tallent v. Fitzpatrick, 253 Mo. l. c. 15.]

In the case in hand there was no attempt on the part of the tenant of the life estate to dispose of the 720 acres devised in the will of her husband except as to the portion thereof consisting of 220 acres constituting the home place. The residue, consisting of 500 acres, upon the death of the life tenant vested in fee in the nine children of the testator or their descendants as remaindermen under the will. Hence, the solitary question on this appeal is whether the deed of the life tenant to defendants cut off the rights of these remaindermen to the property described?

The clause of the will under which the deed made to defendants recites it was made, contains apt terms investing Harriet McFarland, the wife of the testator, with an estate for life in all of his land. The power given to her to alienate is couched in the following language: "With *full* power to sell and dispose of the same or any part thereof absolutely and at her own discretion and with *full* power to give a good and perfect title upon the sale *or other disposition* of any or all of my said property." The will then recites the full confidence of the husband in the wife and in the next paragraph expresses his desire in the final disposition of his estate that the children shall share alike except that two of them shall receive a bonus of \$500, not to be accounted for. But his wishes in this or any other respect, were necessarily subject to the action of his wife under the terms of the will investing her with power to dispose of the property in which she was

given a life estate. Those terms clearly and unmistakably show that she had "full power" of disposition and that she was also given "full power to give a good and perfect title upon sale or other disposition of any or all of my said property," and that these powers were exerciseable "absolutely and at her own discretion." It is perfectly evident in considering these terms that during her lifetime there was no restriction placed upon the manner, mode or object for which the wife might dispose of the property. She was not restricted to a sale for a moneyed price, for the deed gave her "full power" to make a "perfect title by any other disposition," at her discretion, of the property devised. Neither was she restricted to a sale of the entire estate including the remainder given her. There is nothing in the language of the will which permits such a view, nor would it be logical to say that she might dispose of the entire estate, but in so doing could not reserve to herself a life estate. For the power to convey the whole title necessarily carries the power to dispose of any part or parcel of such title, upon the axiom that the whole is the sum of all its parts, and hence, the power to transfer the whole necessarily includes the power to transfer any and all of its component parts. Undoubtedly the established law in this State is that the donee of a power, such as the one in review, can only exercise it in strict and exact compliance with the terms in which it is given. But the language of the will in this case expressly gave the life tenant the power to make a sale or "*other disposition*" of the property during her life. And while it may be conceded that these terms would not invest her with a power to have disposed of the property by will, yet their necessary significance did give her power to sell or otherwise dispose of the lands by a deed *in praesenti*. Now this is what she did under the testimony in this case and in strict execution of the power given to her by the testator. Whether she got the full

price of the land, as to which there was conflicting evidence, is immaterial to the efficacy of the conveyance by her within the scope of the power granted by the will. For as is shown she was authorized in selling or disposing to act "*absolutely and at her own discretion*," which implies *ex vi termini* that the power to dispose was not dependent on the amount of the consideration. In other words, the testator made her his *alter ego* as to the method or mode of disposition of the property devised by any form of alienation other than a will.

Our conclusion is that the deed to the defendants was a valid execution of the superadded power of disposal given to the life tenant by the terms of the will.

II. We are wholly unable to concur with the learned counsel for appellant that the deed to the defendants was not a present conveyance, but was a mere attempt to convey the title by an instrument in the nature of the last will and testament. In *Terry v. Glover*, 235 Mo. l. c. 552, the rule is correctly stated that an instrument to be valid as a deed must be one of present conveyance. In that case the deed contained no words of present conveyance. Neither was it ever delivered, but it did contain this express recital, "This deed not to go into effect until after the death of the said George Glover." Beyond doubt such an instrument shows on its face that it was a mere attempt to make the will without the statutory requirements and therefore void. Exactly the same recital was contained in the deed under review in *Givens v. Ott*, 222 Mo. l. c. 411, and also in the case of *Murphy v. Gabbert*, 166 Mo. l. c. 601.

In the case of *Miller v. Holt*, 68 Mo. 584, the instrument was in *form* a will, it was never delivered and the contention of the grantees that it was in legal effect a deed *in praesenti*, was necessarily overruled. None of these cases (cited by appellant) sustain the

claim that the deed now under review was void as a testamentary disposition of the property and therefore not within the limits of the power delegated under the will, nor in compliance with the statutory power to make wills. This instrument *expressly* reserves a life estate in the grantor and conveys at the same time, by words of present import, a vested remainder in the property to the grantees. It does not provide, as in the cases cited, that the conveyance made shall not be operative as its terms express. It merely recites that "at and after my death then, etc., this deed shall become absolute and fully *vest the title in fee* in said second parties" (italics ours), which is what would necessarily follow as a matter of law from the fact that the deed reserved a present life estate in the grantor. With a life estate expressly retained the "title in fee" could not fully vest in the grantees until the expiration of the precedent estate. Being vested remaindermen, the grantees had a "present fixed right of future enjoyment" (4 Kent's Comm. [14 Ed.], 203), and when the life estate lapsed became the owners *in fee*. It is evident that the effect of this language in the deed was simply to recite a legal consequence of the status of vested remaindermen. The delivery of this deed and its record when made and the provision therein for a life estate in the grantor also tends to show her intent that the conveyance should be, as it purported to be, a present one. [Sneathen v. Sneathen, 104 Mo. l. c. 209; O'Day v. Meadows, 194 Mo. l. c. 617-8-9.] A will is ambulatory and revocable by the maker; a deed, although the enjoyment of the estate may be postponed, when once fully executed, can only be revoked by a stipulation reserved therein.

The deed in this case contained terms of present conveyance of the remainder. It was duly signed, acknowledged, delivered and recorded, and contained no other recital as to the vesting of the fee than one in

accordance with the principles of law applicable to the nature of the instrument. It was therefore an irrevocable contract of present conveyance, binding on the parties according to its terms, and it was neither in form nor essence a testamentary disposition, as defined by the law of the State.

It follows that the judgment herein is affirmed.

PER CURIAM.—The foregoing opinion of BOND, J., in Division No. One, is adopted as the opinion of the Court in Banc. *Woodson, Walker and Bond, JJ.*, concur; *Brown, J.*, concurs in the result in a separate opinion. *Lamm, C. J., Graves and Faris, JJ.*, dissent.

CONCURRING OPINION.

BROWN, J.—I concur in the opinion of my brother BOND in so far as it holds that, under the power conferred by the will of Walter McFarland, Sr., the widow was fully authorized to sell less than a fee simple title in said testator's lands, and that her deed to Abraham McFarland and Walter McFarland, Jr., passed a vested remainder to those parties and was in form legal and valid. [Dewein v. Hooss, 237 Mo. 23.]

I am, however, convinced that the widow was not authorized by the will to give away the land of the testator. The evidence is conflicting as to whether there was a consideration paid by Abraham and Walter McFarland, Jr., for the deed which they received from the widow, and not finding said evidence sufficient to warrant us in overturning the judgment of the circuit court, I concur in the result of the majority opinion affirming said judgment.

I. J. RINGOLSKY, Appellant, v. THE MAUD L.
MINING COMPANY et al.

In Banc, December 1, 1914.

1. **CORPORATIONS: Formation: Partnership Relation Between Organizers: Must be Established by Proof.** Promoters of a corporation are not prima-facie partners. Their partnership must be established by proof.
2. ———: ———: ———: ———: **Evidence.** Where R, T, and G, with others, formed a corporation, each putting in mining property and taking in return stock and bonds of the corporation, evidence *held* not to show that R and T were partners.
3. ———: ———: **Promoters: Secret Profits.** T, G, and G's associates owned four mines. In May, 1905, the plaintiff and M. I. bought an interest in two of the mines, and on July 9, 1905, G offered to sell his interest and that of his associates to the plaintiff and T for \$257,000. They agreed to buy, and a week later the plaintiff, with T and M. I., drew up a contract providing for the formation of a corporation to take over the mines, M. I. to advance \$50,000 and to hold stock as security until G was fully paid, the plaintiff and T to transfer to the corporation all their interest in the mines. T was to receive one-half, and the plaintiff and M. I. each one-fourth of the issued stock. In August, 1905, the plaintiff, G, and M. I., with M. I.'s associates, Bendet Isaacs, Adolph Eliasberg and the two Rosenwassers, entered into an agreement to form the corporation with a capital stock of 2,500,000 shares, par value \$1 each. M. I., the Rosenwassers, and Eliasberg were to pay G an additional \$50,000, and for the \$100,000 total thus paid they were to receive \$1,000,000 in bonds and 500,000 shares of stock in the new corporation. Bendet Isaacs was to pay \$33,333.33 into the treasury and receive the same amount in bonds and 166,666 shares of stock, the stock to be taken out of the holdings of the plaintiff and T. For the additional \$157,000 due him G agreed to take \$100,000 in bonds, a vendor's lien for \$57,000 and 100,000 shares of stock, the bonds to be the first paid by the company and the earnings to be applied to paying off the vendor's lien. T did not sign this agreement, and when in September, 1905, he made several objections to its consummation in that form certain concessions were made to him, and finally G told him he believed the stock he (T) would

get would be worth as much as his (G's) bonds, and agreed to let him, at any time he might wish, take a part of the bonds in exchange for a proportionate share of T's stock. With this understanding between them, undisclosed to the others, the agreement was closed substantially on the contract basis. Afterwards there was drawn and signed a declaration of trust, wherein it was declared that G and T jointly owned the stock and bonds acquired by each. Later both G and T disposed of all their stock and bonds to another corporation. *Held*, in plaintiff's suit for secret profits alleged to have accrued to T by reason of his undisclosed agreement with G, that there can be no recovery, even assuming that T was a promoter and that the plaintiff has the right to sue on behalf of the company after parting with his stock.

Appeal from Jasper Circuit Court.—*Hon. Joseph D. Perkins*, Judge.

AFFIRMED.

New & Krauthoff and McReynolds & Halliburton
for appellant.

(1) The arrangement between Tobias and Ringolsky, outlined in the contract of July 10, 1905, created a partnership between the parties named. This being true, Tobias could not, at the expense of Ringolsky, make any contract with Gundling whereby Gundling, the owner of the property being purchased by the partnership, should pay to Tobias, a member of the partnership, a part of the purchase price received by Gundling. Whatever Tobias did thus receive from Gundling would belong, in equity, one-half to Ringolsky. *Pomeroy v. Benton*, 57 Mo. 544, 77 Mo. 64; *Whitney v. Dewey*, 158 Fed. 391; *Filbrun v. Ivers*, 92 Mo. 388; *Burgess v. Dierling*, 113 Mo. App. 383; 30 Cyc. 419, 438; 38 Century Dig. 783, 784 and authorities cited; *Flower v. Barnekoff*, 20 Ore. 132, 11 L. R. A. 149; *Tyler v. Waddingham*, 58 Conn. 375, 8 L. R. A. 657, and note; 22 Am. & Eng. Ency. Law, p. 114. Even if the relation between Ringolsky and Tobias was not technically that one of a partnership, the principle con-

tended for applies to all instances where persons are jointly associated in a common enterprise. *Trust & Guar. Co. v. Hambleton*, 34 Md. 456, 40 L. R. A. 216; *Ferguson v. Gooch*, 94 Va. 1, 40 L. R. A. 234; *Kimberly v. Arms*, 129 U. S. 528; *Williamson v. Monroe*, 101 Fed. 322; 2 *Bates on Partnership*, sec. 790; 15 *Decennial Digest*, pp. 1118, 1119, *Partnership*, sec. 97; *Pratt v. Frazer*, 129 S. W. (Ark.) 1088; *Davenport v. Bank*, 128 S. W. (Ky.) 88; *White v. Jouett*, 144 S. W. (Ky.) 59. (2) If it be contended that the original relationship existing between Tobias and Ringolsky, that of a partnership or joint association in a common venture, was changed by reason of the transactions had in New York in the latter part of September, 1905, then the result follows that at the time and place named Tobias was the promoter of a corporation and could not, at the expense of the corporation, make a secret profit for his own benefit out of any transaction he had with Gundling. In other words, eight men were sitting in a room engaged in the promotion of a corporation. All eight were directors of the corporation. Four of the eight were interested in selling the property to the corporation. One of the four selling, objected to the terms of the sale. Thereupon, another of the four selling, took the former out of the room and made an agreement with the former whereby the first named director was given an interest in that which the second named director was receiving from the corporation in which both of them were directors. In the law of promoters, it was required that when Gundling and Tobias left the room and made the agreement which both of them admit was made, Tobias, should have returned to the room and advised his associates of the concession that Gundling was willing to make, and such concession so made inured to the benefit of the corporation as a whole and not to Tobias as an individual. *Land Co. v. Case*, 104 Mo. 578; *Seehorn v. Hall*, 130 Mo. 261; *Land & Imp. Co. v. Web-*

ster, 75 Mo. App. 465; 10 Cyc. 274; Yeiser v. Board & Paper Co., 107 Fed. 340, 52 L. R. A. 727; Dickerman v. Trust Co., 176 U. S. 203; Telegraph Co. v. Lotscher, 127 Iowa, 383; C. M. & S. Co. v. Bigelow, 203 Mass. 159; 2 Cook on Corporations (6 Ed.), sec. 643; 1 Clark & Marshall on Priv. Corp., sec. 110; 1 Mechem on Modern Corporations, sec. 377; 1 Thompson on Corporations (1 Ed.), sec. 457. (3) By a declaration of trust executed in April, 1906, and by the agreement made by Gundling with Tobias in New York in September, 1905, Gundling made of himself a trustee, in his own wrong, and held in trust either for the corporation or the partnership, as the case may be, the profit which Tobias was seeking to gain in the stock and bonds in the possession of Gundling. Howell v. Howell, 15 Wis. 55; Shaler v. Trowbridge, 28 N. J. Eq. 595; Partridge v. Wells, 30 N. J. Eq. 178; Renfrow v. Pearce, 68 Ill. 126; Forney v. Adams, 74 Mo. 138; Croughton v. Forrest, 17 Mo. 131; Ackley v. Stachlein, 56 Mo. 561; Blake v. Bank, 219 Mo. 644; Price v. Hunt, 59 Mo. 258; Evans v. Gibson, 29 Mo. 223; Koch v. Branch, 44 Mo. 542.

Henry Russell Platt and Spencer, Grayston & Spencer for respondents.

BLAIR, C.—Plaintiff appeals from a judgment for defendants in a suit to recover secret profits alleged to have been realized by defendant Tobias in connection with the sale of mines to a corporation, the defendant Red Top Zinc & Smelting Company. Upon grounds hereafter stated other defendants are alleged to have become liable. The mining properties involved were the Maud L., the Cumberland, the Ada B., and the Oronogo, all in Jasper county.

In 1905 defendants Tobias and Gundling each owned a one-half interest in the first two, and Tobias owned one-fifth and Gundling and certain associates

owned four-fifths of the others. In May or June, 1905, plaintiff and Moe A. Isaacs jointly purchased a one-fifteenth interest in the Maud L. and Cumberland, Tobias and Gundling each retaining a seven-fifteenths interest therein. In May, 1905, these latter applied to plaintiff for a loan. Plaintiff proposed to form a corporation to take over the properties and borrow \$30,000, plaintiff offering to accept the corporation's note for \$5000 and one-fourth of the capital stock for his services in securing the loan, urging that his connections were such that his name would give great prestige to the enterprise. This suggestion was not adopted. Gundling concluded to sell his interests and, July 9, 1905, offered them to Tobias and plaintiff for \$257,000, plaintiff to receive \$33,000 additional for his compensation in negotiating the sale. Plaintiff and Tobias agreed to buy and a week later visited New York and they and Moe Isaacs drew up a contract providing for the formation of a corporation to take over the mines. Isaacs agreed to advance the company \$50,000, holding the stock as security until Gundling was fully paid, plaintiff to perform all legal services and Tobias to transfer to the corporation his interests in the mines. It was agreed that Gundling should be paid \$257,000 for his interests and those of his associates in the Ada B. and Orónogo and that Tobias should receive one-half and plaintiff and Isaacs, each, one-fourth of the issued stock.

Previous to the execution of this contract plaintiff and Tobias signed an agreement and executed certain notes to secure Isaacs from loss in case he signed the contract, and to secure him for money advanced if he concluded not to sign it.

Plaintiff and Tobias returned to Missouri, and Gundling expressed no dissatisfaction with the contemplated arrangement. It did not modify the terms of the contract of July 10, 1905, in so far as it concerned Gundling.

Moe A. Isaacs and his associates sent an expert to Missouri who examined the mines and reported thereon. His expenses were subsequently paid by plaintiff and Tobias. Concerning this plaintiff wrote Tobias: "I note everything you say and every sentiment and feeling expressed by you I coincide with and have felt myself. I think it was an outrageous proceeding to send an expert to Joplin at our expense at a cost of \$1000, and when I see Moe he will find that things will have to be entirely changed or I will end the contract in New York. I am tired of the imposition and the entire situation." In the same letter, dated July 28, 1905, plaintiff wrote: "I will see that we have an opportunity to discuss everything before I undertake to make any changes in the agreements we made."

Installments falling due under the contract of July 10, 1905, aggregating \$50,000, were paid Gundling, Moe A. Isaacs and his New York associates advancing the money.

About the last of August, 1905, plaintiff and Gundling visited New York. Associated with Moe A. Isaacs were Bendet Isaacs, Adolph Eliasberg, Morris Rosenwasser and Harry Rosenwasser, and these and plaintiff and Gundling entered into an agreement August 29, 1905, which recited the fact that Gundling had contracted to sell the properties to plaintiff and Tobias for \$257,000; that all the parties (including Tobias) had become interested in financing the properties; that Gundling had been paid \$50,000, furnished by Moe A. Isaacs, the Rosenwassers and Eliasberg; that it was then agreed plaintiff was to form a corporation, the Red Top Zinc & Smelting Co., with a capital stock of \$2,500,000, par value of shares \$1 each; that each of the four mines involved was to be incorporated, the stock to be held by the Red Top, etc., Company, and therefore it was agreed that:

Moe Isaacs, the Rosenwassers and Eliasberg were to pay Gundling an additional \$50,000, and for the \$100,000 paid were to receive \$100,000 in bonds and 500,000 shares of stock of the new company. Bendet Isaacs was to pay \$33,333.33 into the company's treasury and receive \$33,333.33 in bonds and 166,666 shares of stock, this stock to be given out of the holdings of plaintiff and Tobias.

Seven thousand and five hundred dollars in cash was to be paid by the company to Moe A. Isaacs for the money he had invested in the mines; 500,000 shares of stock to remain in the treasury.

For the additional \$157,000 due him Gundling agreed to take \$100,000 in bonds and a vendor's lien for \$57,000 and 100,000 shares of stock, the bonds to be the first paid by the company, and Gundling to take \$57,000 from the earnings to pay off the vendor's lien.

The new company was to issue bonds for \$233,000, bearing 7% interest; no dividends to be paid until bonds were paid, and the \$57,000 secured by vendor's lien to be paid in advance of payment of the bonds; the new company to own a one-half interest in the Galena mines. There were other provisions which need not be set out.

This agreement was signed by all the persons named above except Tobias, who was not present. Plaintiff wired Tobias stating the salient features of the new agreement and closing: "Wire if you can make contract embodying these terms generally." The following day the plaintiff received a telegram from Tobias asking if working capital would be furnished. Without further authority plaintiff signed the name of Elias Tobias to the agreement. Plaintiff did not see Tobias again until another meeting was had in New York in the latter part of September, and there is no evidence Tobias ratified plaintiff's action in signing the agreement for him. On September 15th Tobias wrote plaintiff objecting to certain features of the

agreement, particularly to the inclusion of the Galena property and to the fact that the dividends he was to get were to be small and postponed for some time. In this letter he neither said he would nor that he would not accept the agreement as made, modified in the particulars mentioned. He complained he was "doing more than his part in the transaction."

At the meeting in New York, September 29 and 30, 1905, Tobias made several objections to the written agreement. He demanded that the Galena mine be left out, that a note of his to Moe A. Isaacs be paid by the new company, objected to giving up part of his stock to Bendet Isaacs and to Gundling and complained he was putting in unencumbered interests and getting only encumbered interests. He indicated he would not go further with the matter. It was finally agreed the Galena property should be omitted and that the company should pay the \$2500 note. This left the matter of the transfer of part of Tobias's stock to Bendet Isaacs and Gundling. The negotiations seem to have been conducted at a series of conferences in which sometimes all and at times only two or three participated. Gundling had been paid \$50,000 in cash and had paid this out. He became worried lest the position Tobias took would result in the abandonment of the whole undertaking, in which event he would have to repay the \$50,000, which he was not in a position to do. Gundling finally took Tobias aside and told him the situation he would be in if the matter was dropped and stated he believed that if it was closed up the stock Tobias would get would be worth as much as the bonds he (Gundling) would get, and offered to permit Tobias to take a part of the bonds in exchange for a proportionate part of the stock Tobias would get. With the understanding he could do this if he desired, Tobias agreed to go on with the business. The matter was then closed up, practically on the contract basis, except insofar as the concessions to Tobias modified it.

Nothing was said to the others, so far as the evidence shows, by Tobias or Gundling about the agreement they had made.

The net result was that the new company secured the full title to the four mines, subject to a vendor's lien for \$57,000 and a deed of trust securing bonds amounting to \$233,333, and had \$23,300 in the treasury. Gundling received \$100,000 in cash, \$100,000 in bonds and 100,000 shares of stock. Tobias received 822,224 shares of stock and plaintiff 411,220 shares. Moe A. Isaacs, Bendet Isaacs and Eliasberg each received \$33,333 in bonds and 166,666 shares of stock, and the two Rosenwassers received, jointly, a like portion, in accord with the contract. Subsequently Moe A. Isaacs negotiated the sale to Gundling of the \$66,666 in bonds held by the Rosenwassers and Eliasberg, retaining \$3000 of them for his trouble. With these Gundling also acquired the stock of the vendors, amounting to 333,220 shares. These bonds were discounted \$10,000, and Gundling procured the money to buy by borrowing a large sum from one Werner, using the \$57,000 vendor's lien as collateral.

About March, 1906, Gundling conceived the idea that plaintiff and Moe A. Isaacs were scheming for control of the company. April 6, 1906, there was drawn and signed a "declaration of trust," wherein it was stated Gundling and Tobias jointly owned the \$163,000 in bonds and 433,224 shares of stock Gundling had acquired and the 822,224 shares of stock issued to Tobias. This declaration was actually drawn, signed, and acknowledged April 6, 1906, but was dated August 5, 1905, for the purpose of indicating that Tobias became responsible for his one-half of certain indebtedness incurred by Gundling in connection with the various transactions prior to the actual execution of the instrument.

For one thing Gundling had paid out about \$135,000 in buying out his associates in the Ada B and Oro-

nogo mines, and, it seems, to liquidate certain indebtedness of these properties. Other facts will be referred to in the opinion.

Plaintiff contends (1) that he and Tobias were partners, or, if not, (2) that he and Tobias and Gundling were promoters, and that on either theory the judgment is wrong.

In the view taken of the case it is unnecessary to discuss the question whether plaintiff can sue on the first theory in his individual capacity and on the second in a representative capacity in the same case and on a petition containing a single count. [Turner v. Markham, 155 Cal. 1. c. 569, 570.]

The actual basis of plaintiff's claim is that Tobias's stock was worth less than the stock, bonds and vendor's lien given Gundling and, consequently, the agreement between the two resulted in a profit to Tobias for which he must account either to plaintiff as his partner or to the corporation as one of its promoters. It is contended Gundling is liable by reason of having parted with Tobias's stock and bonds after notice of plaintiff's claim, and the Oronogo Circle is liable as a purchaser with notice. The other corporations are made defendants because their property may be affected and the other individual defendants are the remaining incorporators of the Red Top Zinc & Smelting Company.

I. "Partnership is a matter of contract. A man cannot be made a partner against his will, by accident or the conduct of others. He must agree to be a partner, or, as to outsiders, hold himself out as a partner to those who have trusted him as such."

**Formation of
Corporations:
No Partnership
Between
Organizers.**

[Freeman v. Bloomfield, 43 Mo. 1. c. 392.] There was no general partnership between plaintiff and Tobias (Whitehill v. Shickle, 43 Mo. 537) and, even if it be assumed they were promoters, prima-

facie no partnership between them existed. [10 Cyc. 271, 272.] The burden is still on plaintiff to make out the fact of partnership by evidence.

If this was a partnership venture, it is pertinent to inquire when the relation began. There is nothing in the agreement Tobias, plaintiff and Isaacs signed constituting a partnership. Plaintiff was to form a corporation and get stock for his services. Tobias was to receive stock for his property he put in. Neither was to receive any part of the share of the other. Plaintiff was not of the opinion he had any right to bind Tobias when he wired him asking whether he could agree to the contract of August 29, 1905. His testimony indicates he signed Tobias's name to the agreement solely because he inferred from Tobias's reply telegram that permission was intended to be given, an inference it is not now contended can properly be drawn from that telegram.

Tobias repudiated portions, at least, of the contract of August 29, 1905. There is no evidence any claim was then made by plaintiff or any one else that Tobias was bound by plaintiff's act in signing his name to that contract. Nor does plaintiff now suggest that Tobias is or ever was interested in the stock he, plaintiff, received or the \$10,000 he got for it.

True, plaintiff testified Tobias was his partner and Tobias testified the contrary.

The trial court did not find a partnership existed, and, on the evidence, we are not disposed to criticise the view it took.

II. It is contended Tobias was one of the promoters of the company formed; that his relation to his associates was consequently of a fiduciary character and that his agreement with Gundling was violative of his obligation arising out of that relation; in that, it is asserted, Gundling's stock, bonds and vendor's lien were

Promoters:
Secret Profits.

worth more than the stock offered Tobias, and that Gundling, therefore, received, under that agreement, less than the other six incorporators had contracted to give for his interests; that Tobias got the difference and that this constituted a secret profit for which he should account and for which Gundling is chargeable on the theory that he had Tobias's interest in his possession with knowledge of the trust and, having parted with it, is liable for the amount of the profit Tobias is declared to have realized.

Let it be assumed that Tobias was in fact a promoter of the company and that the interest he took under the agreement with Gundling was of greater value than the 822,224 shares of stock offered in the first place for his interest in the properties. Further, let the question of plaintiff's right to sue on behalf of the company, after having parted with his stock, be waived.

The contract of August 29, 1905, modifying the contract Tobias signed July 17, 1905, was never signed by Tobias, nor did he ratify plaintiff's act in signing for him. That contract fixed the value of Gundling's interest at \$257,000 and provided for paying him \$100,000 in money, \$100,000 in bonds, \$57,000 by vendor's lien and for the issuance to him of 100,000 shares (\$1 per share, par value) of stock for his interest. Plaintiff contracted to accept 411,000 shares of stock for his services. Tobias (all the others had agreed) was to receive 822,224 shares of stock for his interests in the properties. The five other than plaintiff, Tobias and Gundling were to receive bonds equaling in amount the cash each advanced and, in addition, five shares of stock for each dollar thereof. For this stock they paid nothing. The stock represented the equity in the properties. There was neither intent to sell nor sale of stock to third persons. There were no subscribers save the eight. Plaintiff's compensation was represented by the stock issued to him and

represented a fixed portion of the equity in the properties being acquired by the corporation at the prices stated in the contract. The bonuses in stock issued to Moe A. and Bendet Isaacs, the two Rosenwassers and Eliasberg were likewise issued on the basis of the equity resulting from encumbering the properties for \$290,000. The six incorporators other than Tobias and Gundling received the exact amount of stock they contracted for and it represented the exact portion of the identical equity they had contracted it should represent.

The agreement between Tobias and Gundling did not affect the value of the stock of the six others in the smallest fraction. The contention made assumes, in fact, that if Gundling's interests had been acquired for less and the value of the equity had been thereby proportionately increased, the amount of the bonds being reduced, the six named would have been awarded the same proportion of the equity, plaintiff for services and the others for stock bonuses. That is an assumption, in effect, that the six had some claim outside the contract itself. That is not true in fact or in law. So far as concerns the question before us, they contracted for designated portions of an equity the contract described and each of the six received that for which he contracted. Neither can claim more. The agreement between Gundling and Tobias neither decreased nor increased the value of the equity, and, consequently, did not affect the other six.

There is no pretense there was any misrepresentation of the value of the properties. The evidence strongly tends to show that Tobias's unencumbered interests were worth as much as Gundling's actual interests (associates owning part of two mines) and, therefore, that Tobias neither gained nor lost by his agreement with Gundling, as Gundling asserted when the agreement was made. The present owner of the stock is defending in this case and none of the origi-

nal incorporators have any right to complain, even had they not all parted with their stock. Neither can the company, or plaintiff in its behalf, complain of the transaction. [Old Dominion Copper Co. v. Lewishon, 210 U. S. 206; Milwaukee Cold Storage Co. v. Dexter, 99 Wis. 215.]

This is not a case in which promoters have deceived their fellow incorporators or subsequent subscribers by misrepresenting or concealing the price of property delivered to a corporation they were forming. There is no evidence Gundling would have accepted a dollar less than the \$257,000 he contracted for or that he would have made the agreement he made with Tobias except upon the theory that Tobias's stock equaled the value of what he, Gundling, was receiving—a view the evidence tends strongly to support when the outstanding interests Gundling was obligated to acquire and Tobias's assumption of one-half of this burden are considered.

The \$63,000 in bonds and the stock accompanying them properly went into the declaration of trust as the substitute for the \$57,000 vendor's lien which was first included but had been used by Gundling to acquire them.

III. The trial court did not, apparently, give great weight to the document whereby Isaacs at plaintiff's instance agreed to extend Gundling's notes for \$68,000 in consideration that he recognize certain rights of plaintiff. When plaintiff amplified this, in writing, to provide that Gundling should turn over one-half of Tobias's stock and bonds in his hands, plaintiff promptly refused to agree. When the document mentioned was signed, plaintiff was and for months had been Gundling's attorney, employed to oppose claims Tobias was making in connection with the declaration of trust and which Gundling thought were inequitable and unjustifiable under that instrument. Plaintiff, sev-

eral months after being engaged by Gundling as his attorney in this matter, advised Gundling that Tobias could not recover anything but that he, plaintiff, could, as Tobias was his partner, and advised Gundling to turn over to him Tobias's stock and bonds. This Gundling and another of his lawyers testified he refused to agree to do. The trial court evidently believed then instead of believing plaintiff and Isaacs, and the record does not persuade us the trial court was wrong in this. The alleged "confession" of Gundling, in July, 1906, that Tobias had kept him informed of plaintiff's doings in connection with his transactions in the east, has little of substance in it, was explained by Gundling as relating to matters after September, 1905, and on plaintiff's construction of it is inconsistent with his denial of all knowledge of the declaration of trust until November, 1906. Further it is of little consequence unless plaintiff and Tobias were partners, a fact not made out on this record. The judgment is affirmed. *Brown, C.*, concurs.

PER CURIAM.—This case coming into Banc from Division on a dissent, on rehearing the opinion of *BLAIR, C.*, is adopted as the opinion of the court. *Woodson, Graves, Brown, Walker, and Faris, JJ.*, concur; *Lamm, C. J.*, and *Bond, J.*, dissent.

THE STATE ex rel. GEORGE N. WARDE,
MATHEW KIELY, THADDEUS STEPHENS,
WILLIAM RIPPLE, GRAND AVENUE BANK,
and NORTHWESTERN BANK OF ST. LOUIS
v. EUGENE McQUILLIN, Judge of Circuit Court,
and CHARLES ALBRECHT and J. WALTER
STAGE, Members and Trustees of St. Louis
Lodge No. 3, Loyal Order of Moose, and ST.
LOUIS LODGE NO. 3, LOYAL ORDER OF
MOOSE.

In Banc, December 1, 1914.

1. **PROHIBITION: Motion for Judgment.** A motion by relators in prohibition, for judgment on the pleadings, filed after the coming in of the return, is a challenge, in legal effect, to the legal sufficiency of respondents' return.
2. ———: **When Writ Will Go.** A writ of prohibition will only go to keep an inferior court within the orbit of its jurisdiction. It is an extraordinary writ, and no recourse must be had to it except where ordinary remedies are unavailing.
3. ———: ———: **How Lack of Jurisdiction May Appear.** Lack of jurisdiction may exist with reference to subject-matter generally (example, the class to which the case belongs) or with reference to the parties to the suit, or to excess of jurisdiction in the concrete case.
4. ———: ———: **Discretion.** The mere power to grant a writ of prohibition is not of so much importance in determining whether or not it shall go as is the question of the discretion of the court which is asked to issue it. Such discretion is always to be reckoned with and steadily applied with judicial circumspection.
5. ———: ———: ———: **Crowded Docket.** In the congested state of its docket, the Supreme Court will wisely exercise a sound discretion in refusing to draw to itself jurisdiction in the first instance on prohibition to determine the merits of controversies lodged in circuit courts, except on a clear showing of a lack of jurisdiction as a matter of law as distinguished from matter of fact, and that ordinary remedies by appeal, error or *certiorari* are absent.

6. ———: ———: Injunction. The circuit court has jurisdiction of the subject-matter of issuing a temporary injunction to restrain a forcible and continuous trespass upon the property of a corporate lodge by the officers of the supreme organization and others, and the confiscation of its lodge furniture and money in bank, to be followed by a permanent one or by a dissolution thereof, on the application of equitable principles to the facts ascertained on final hearing, on answer or motion to dissolve; and having jurisdiction of the parties, the presence of those things is an insurmountable barrier to the issuance of a writ of prohibition before there has been any demurrer or answer, or motion to dissolve, unless, in some way, the court is proceeding in excess of that jurisdiction.
7. ———: ———: ———: Cause of Action. The contention that the bill for injunction did not state facts sufficient to constitute a cause of action will not authorize prohibition, where the bill is either demurrable and no demurrer has been filed, or is subject to a motion to make more definite and certain and no such motion has been filed; for, in such cases, the Supreme Court is bound to assume that, if the trial court is given an opportunity to rule on the demurrer or motion, it will rule correctly, and it will not anticipate its ruling, or permit prohibition to be used to permit correction, in advance of its anticipated erroneous rulings.
8. ———: ———: ———: Insufficient Pleadings. On prohibition the determinative question is not the sufficiency of the pleading in the trial court, where pleadings are amendable, but it is one of jurisdiction of the parties and subject-matter, or excess of jurisdiction; and if jurisdiction be present, and is kept within its proper channels, prohibition cannot go.

Prohibition.

WRIT DENIED.

O. J. Mudd for relators.

(1) The supreme lodge in taking possession of the property of the subordinate lodge through its agents, as it did, was within its rights, was proceeding regularly as prescribed by the laws of the order, and the law of the land will not intervene at this juncture to arrest such possession and give the property back to

the subordinate lodge. *State ex rel. v. Grand Lodge*, 8 Mo. App. 154; *Colman v. Supreme Lodge*, 18 Mo. App. 189; *Mulroy v. Knights of Honor*, 28 Mo. App. 463; *Crutcher v. Order of R. W. Cond.*, 151 Mo. App. 622. (2) Injunction is not the right remedy or a lawful procedure by which to test the right of possession of property, and even if the possession of the Supreme Lodge were wrong or unwarranted by the law of the land, the issuance of the writ in such a case is a usurpation and an invasion of constitutional right of trial by jury. R. S. 1909, secs. 2534, 2515, Constitution, Mo., art. 11, sec. 28; 1 *High on Injunctions*, secs. 360, 699, 715; 22 *Cyc.* 826, 828-9; *Smith v. Jameson*, 91 Mo. 13; *Owen v. Ford*, 49 Mo. 436; *Gildersleeve v. Overstolz*, 97 Mo. App. 303; *Powell v. Canaday*, 95 Mo. App. 713; *State ex rel. v. Wood*, 155 Mo. 445; *Boeckler v. Railroad*, 10 Mo. App. 448; *Carlin v. Wolff*, 154 Mo. 539; *Davis v. Hartwig*, 195 Mo. 380; *Brier v. Bank*, 225 Mo. 683. (3) Insolvency of a defendant will not convert an action at law into one in equity. 22 *Cyc.* 838-9. (4) The facts alleged in the petition do not warrant an injunction to restrain defendants from withdrawing funds from the Northwestern Bank. *Real Estate Co. v. City*, 169 Mo. 234; 22 *Cyc.* 924-5-6; *McKinzie v. Mathews*, 59 Mo. 99; *Worthington v. Lee*, 61 Md. 530; *Mallineroth v. Nemnich*, 169 Mo. 388. (5) If on the pleadings the law did not warrant a writ of injunction, the alternative writ of prohibition should be made absolute. *State ex rel. v. Sale*, 188 Mo. 493; *State ex rel. v. Wood*, 155 Mo. 425.

Milton B. Rosenheim and Jesse L. England for respondents.

(1) The action of the supreme lodge, through relators herein, in declaring a forfeiture of all the property, real and personal, of the respondents, without preferring charges against the local lodge and its

members or in any manner giving the local lodge and its members an opportunity to be heard in defense of their property rights, deprived the said local lodge and its members of their property rights without due process of law, and was in plain violation of the Constitution of the State and of the United States. Such action is the embodiment of a legal wrong and will warrant injunctive relief. *Austin v. Searing*, 16 N. Y. 112; *Wicks v. Monihan*, 130 N. Y. 237; *Turner v. Stewart*, 78 Mo. 481; R. S. 1909, sec. 2534; Const. Mo., art. 2, sec. 30; *Bauer v. Samson Lodge*, 102 Ind. 269. (2) The petition and return set out in relators' application fully show that property rights are involved and that one of the issues made is the right to possession to certain real and personal property, said property being claimed by two factions of a fraternal beneficiary association. Injunction has always been held to be the proper remedy in such cases. *High on Injunctions*, sec. 305; *Fullbright v. Higginbotham*, 133 Mo. 676; *Prickett v. Wells*, 117 Mo. 502; *Boyle v. Roberts*, 222 Mo. 613; *Bacon's Benefit Societies and Life Ins.*, sec. 68. (3) A court of equity has jurisdiction to prevent repeated and continuous trespass, and this, regardless of whether the trespasser is solvent or insolvent. The petition in this case expressly alleges that the defendants are trespassers on the real property of the plaintiff corporation, and that such trespass is continuous and repeated. *Turner v. Stewart*, 78 Mo. 481; *Sills v. Goodyear*, 80 Mo. App. 132; *Beach on Injunctions*, sec. 1135; *State ex rel. v. Gravel Road Co.*, 116 Mo. App. 175; *Hobart Lee Tie Co. v. Stone*, 135 Mo. App. 456. (4) If the court *nisi* had jurisdiction of the class of cases to which the proceedings sought to be prohibited belongs, and acquires jurisdiction of the subject-matter, the mere matter of defects in the petition or complaint by which the proceeding was inaugurated, will not authorize the issuance of a writ of prohibition. Hence the question of whether the petition states a cause of

action, as relators contend that it does not, is not a matter to be inquired into by writ of prohibition, but rather by appeal, writ of error or *certiorari*. State ex rel. v. Stobie, 194 Mo. 52; State ex rel. v. Railroad, 100 Mo. 61; Schubach v. Donald, 179 Mo. 182; High on Extraordinary Rem. (3 Ed.), sec. 767a; State ex rel. v. Lucas, 236 Mo. 18.

LAMM, C. J.—Original proceeding by prohibition.

Defendants in an injunction suit pending in a division (to-wit, respondent McQuillin's of the St. Louis Circuit Court, as relators, apply here by petition on August 14, 1914, for a writ prohibiting that court from proceeding further, and made the plaintiffs in said injunction suit parties respondent with Judge McQuillin. Presently, on that application, a preliminary rule issues in vacation to show cause. Presently, respondents make return showing such cause as they had why our preliminary rule should not be made permanent. Thereupon relators file a motion for judgment on the pleadings. Thereby they insist that the preliminary rule should, as a matter of law, ripen into a permanent writ on the admissions and facts shown by the pleadings. Thereupon (without any evidence on, or determination of, controverted facts) the case is submitted on briefs and oral argument.

Under such circumstances, the motion for judgment on the pleadings is a challenge, in legal effect, to the legal sufficiency of respondents' return. Hence it is from admissions and allegations of that return, we must get the facts, if at all. [State ex rel. v. Shields, Judge, 237 Mo. 333-4.] Attending thereto, the case is this:

In July, 1914, respondents Albrecht and Stage, as members and trustees of St. Louis Lodge No. 3, Loyal Order of Moose, joining with them a domestic corporation, designated as "St. Louis Lodge No. 3, Loyal Order of Moose," as plaintiffs, brought suit in the St.

Louis Circuit Court against relators in the instant case, to-wit, Warde, Kiely, Stephens, Ripple and the two named banks, the life of the bill being injunctive relief. Verified by affidavit, the substance and theory of the bill were that St. Louis Lodge No. 3, Loyal Order of Moose, hereinafter called "local lodge," is organized under the laws of this State as a domestic corporation having a fraternal, beneficiary character; that as such domestic corporation it owns valuable real estate in the city of St. Louis, improved by a clubhouse and outbuildings, said clubhouse containing billiard, pool, library and lounging rooms, bowling alleys, "and other social features" to be "enjoyed" by the members of said corporation, which latter has a paid up membership of over 2100 souls in good standing, and certain named officers, among them three trustees (to-wit, Albrecht, Stage and Teasdale, the latter refusing to join as plaintiff); that while the title to the real estate is vested in the local lodge, the care, control and custody of the personal property are in the named trustees, who have "sole jurisdiction" to invest the lodge moneys, handle trust funds, pay bills and control the lodge property, the majority of said trustees having power to act. This local lodge had \$2700 deposited in the two banks, joined below as defendants and here as relators. The "furnishings" in the club house were of the value of \$7500. We infer that the foregoing bank deposits are covered by the term "surplus money of the lodge" including "sick benefits" and "funeral expense funds," and it was the duty of the said trustees as need called to invest said funds. Having further alleged that the money and personal property aforesaid are the property of the members of the local lodge, the bill goes on to aver that the said domestic corporation, the local lodge, had also received a "charter" from the "Supreme Lodge of the World, Loyal Order of Moose," a voluntary association of persons, authorizing it (said

local lodge) to conduct such lodge in accordance with a ritual and form of government adopted by the supreme lodge; that on the 22d day of July, 1914, said supreme lodge, acting through defendant Warde (relator here) summarily, and without just cause or excuse, revoked the charter it had granted the domestic corporation, and thereupon proceeded to confiscate and take possession of its property, declaring the same to be forfeited to the supreme lodge; that thereupon said Warde, himself a non-resident of the State of Missouri, joining with him Stephens, Kiely, Ripple, relators here, and other persons unknown, by trespass wrongfully gained control of the clubhouse and the property of the local lodge, and by continuing their trespass with force and arms without warrant of law are holding possession and are denying to the members of said local lodge access to said premises, and using armed force in that behalf; that said trespassers are insolvent; that two of them, Warde and Stephens, have wrongfully appropriated some of said funds in said banks and are about to appropriate and unless restrained will appropriate the rest of them, so as aforesaid the sole and absolute property of the members of the local lodge. The bill avers, furthermore, that by such trespassing and force members of the local lodge are and will be deprived of their rights of ingress and egress to the lodge property; that the act of confiscation by the supreme lodge through Warde was arbitrary and capricious and that the greater part of the members of the supreme lodge are not residents of the State; that there is no redress for such wrongful acts except through a court of equity.

The bill was filed, as said, (1) on behalf of the local lodge, (2) the controlling majority of the board of trustees, who sued not only as such but as members of the local lodge, and (3) on behalf of any other members who care to join and share the burdens and privileges arising therefrom. It prays for a temporary in-

junction enjoining defendants from trespassing upon the property and interfering with the entrance thereto of any of the members of the local lodge and from assuming control or taking jurisdiction of any of the moneys aforesaid, or of the personal property, and restraining said banks from paying over to defendants any such moneys.

Thereupon, on due assignment to his division, Judge McQuillin issued an order citing defendants to show cause why a temporary injunction should not issue. Thereupon defendants, other than the banks (who stood mute below) came in and attempted to show cause why no preliminary injunction should issue. They filed no demurrer or answer to the bill, but they filed a paper called a "return," and verified this by affidavit. This "return" did not challenge the sufficiency of the bill as a pleading, neither specially nor generally, because of not stating facts sufficient to constitute a cause of action, but in substance it averred (this by way or in the nature of a denial) that the supreme lodge was a corporation under the laws of Indiana with power to sue and to be impleaded as such. It then set forth, broadly, the purposes of the Indiana corporation as fraternal, benevolent, charitable and educational, to assist needy members and their families and their widows and orphans, to encourage patriotism and obedience to the laws of their country, tolerance in religion, etc., etc.; that the supreme lodge organized the named local lodge and granted it a charter in the terms provided by the constitution and laws of the supreme lodge for the government of local lodges. It then goes on to make certain admissions as to the ownership of the real property and the control of the personal property by the board of trustees of the local lodge, but avers that the local lodge was at all times subject to the jurisdiction and bound by the laws of the supreme lodge; admits Warde has taken possession and holds possession and is using "whatever

forces are necessary to repel invasions and to protect their said possession." It then sets forth certain sections of articles six, twenty-six, sixteen and ten of the laws and constitution of the supreme lodge, providing for the revocation and suspension of the charters of a local lodge whenever in "the opinion" of the supreme dictator (an officer of the supreme lodge) the "conditions warrant it," and showing that in case of such suspension or revocation the property of the local lodge is forfeited to the supreme lodge, and that said dictator or some member authorized by him is required to take possession of the property.

As further justification and excuse of the conduct of Warde and those he joined with himself in making and continuing the alleged trespasses, they by way of said "return" went on to aver that the "dictator," under his authority as such, revoked the charter of the local lodge "in due course" and on such revocation authorized Warde to take possession of the property of the local lodge, and he did take possession and now holds it, with all such properties, moneys, etc., as the properties of the supreme lodge, and was so in such possession before the bill was filed; that the local lodge has no existence because of such forfeiture and confiscation and none of its members have any right to the possession, custody or control of any of said property; that there is a "supreme forum" provided by the constitution and laws of the supreme lodge, to-wit, a "court" authorized to hear and determine disputes between the supreme and local lodges or between any lodge and its members; that this *supreme forum* on "appeal" has jurisdiction of the controversy we have outlined, but that plaintiffs have taken no such appeal, wherefore it is the duty of defendants to hold the property subject to the direction of the supreme forum and of the supreme lodge; that the supreme lodge is not insolvent and now by its agents offers to enter its ap-

pearance and accept service if plaintiffs elect to sue out summons against it.

Such in brief is the showing made below to Chancellor McQuillin, in chambers, we assume, and before the return term, before answer, or demurrer.

Presently he issued a temporary injunction, conditioned on the filing of a \$10,000 bond, restraining defendants until further order of the court from trespassing on the property in question or interfering with the entrance of the members of the local lodge and from disposing of or assuming control over the moneys of the local lodge, or of the property belonging to the lodge, or withdrawing such moneys from the banks named. The injunction bond was presently filed, and the order granting a temporary injunction was served upon defendants prior to the filing of the petition in this court in the instant case for prohibition.

The return in the instant case shows not only the foregoing facts, but it goes on to challenge the validity of those provisions of the by-laws and constitution of supreme lodge under which relators here (defendants below) sought to justify the confiscation, forfeiture and forcible seizure by trespass and retention by continuing trespasses and force of arms of the property of the local lodge and the personal property of the 2100 members thereof, alleging that the confiscation was contrary to law and without due process of law; that the act of taking possession was an unlawful act, a trespass pure and simple, as was the forcible denial of access to the clubhouse and property by the members of the local lodge, for which grievances, it is alleged, there was no proper and adequate remedy at law, and which trespasses defendants below (relators here) threatened to repeat and continue; that respondent McQuillin had jurisdiction of the persons of defendants and of the class of cases to which this controversy belongs, to-wit, the subject-matter, and that a writ of prohibition ought not to issue against him, thereby al-

lowing prohibition to take the place and effect of appeal, error or *certiorari*; that equity has jurisdiction also to avoid a multiplicity of suits, and because of the insolvency of the trespassers, and because two factions of a fraternal beneficiary association are claiming the real and personal property; and that, therefore, respondent McQuillin did not exceed his power as judge in taking jurisdiction, etc.

It is on such a record we are called on to adjudge whether our permanent writ shall go prohibiting Judge McQuillin from entertaining further jurisdiction of the injunction suit. We have come to the conclusion our preliminary rule, improvidently made, stands to be quashed, and that a permanent writ must be denied; because:

(a) As a foreword it is not amiss to repeat some propositions often announced, but sometimes blinked, to-wit:

(1) in the first place, a writ of prohibition will only go to keep an inferior court within the orbit of its jurisdiction. It is an *extraordinary* writ and no recourse must be had to it except where *ordinary* remedies are unavailing—the maxim being that in law we have recourse to what is extraordinary when the ordinary fails. (*Recurrentum est ad*, etc.)

(2) In the second place, lack of jurisdiction may exist with reference to subject-matter generally (*e. g.*, the class to which the case belongs) or it may exist with reference to the parties to the suit, or it may exist with reference to excess of jurisdiction in the concrete case itself.

(3) In the third place, the mere power to grant a writ of prohibition (or other extraordinary writ, barring *quo warranto* at the instance of the Attorney-General) is not of so much importance in determining the question of writ or no writ as is the question of the discretion of this court when it is called upon to exercise the power. The right and settled doctrine is that

such discretion exists to be always reckoned with and steadily applied with wise circumspection.

(4) In the fourth place, from that right doctrine, another flows as a corollary, to-wit, that in the congested state of our docket in appealed cases this court will wisely exercise a sound discretion in refusing to draw to itself jurisdiction *in the first instance* on prohibition to determine the merits of controversies lodged in circuit courts, except on a clear showing of lack of jurisdiction as a matter of law as distinguished from matter of fact, and that ordinary remedies by appeal, error or *certiorari* are absent.

If authority be needful or useful to sustain one or the other of those primary and basic propositions, such authority will be found in the pronouncements of one or the other of the following cases (some in one and some in the other): State ex rel. v. Shelton, 238 Mo. l. c. 292 et seq.; State ex rel. v. Sale, 188 Mo. l. c. 496 et seq.; State ex rel. v. Stobie, 194 Mo. l. c. 52; State ex rel. v. Lucas, 236 Mo. l. c. 32; State ex rel. v. Shields, 237 Mo. l. c. 334 et seq.; State ex rel. v. Robinson, 257 Mo. 584 (*vide* closing remarks of opinion by BROWN, J.); State ex rel. v. Kansas City Gas Co., 254 Mo. l. c. 531; State ex rel. v. Tracy, 237 Mo. 109.

It is in the light of the foregoing guiding propositions this case must be ruled, if it is to be disposed of *secundum regulam*.

(b) We shall assume on the record here that it goes without even saying that the circuit court had jurisdiction of (1) the parties and (2) the subject-matter, to-wit, the issuing of a temporary injunction, to be followed by a permanent one or by its dissolution on the application of equity principles to the facts ascertained on final hearing, in term, on answer or on motion to dissolve, or on joint hearing on both. Now, according to all good doctrine, the presence of jurisdiction in those prime essentials is an insurmountable barrier to the issuance of our writ of prohibition, unless,

peradventure, the circuit court was swelling its jurisdiction in the case beyond its prescribed channel, even as a stream by excess of water bursts its banks now and then. [*Vide* cases, *supra*.]

(c) With so much determined, we confront the question of an excess of jurisdiction in the concrete case. Attend to that view of it.

It is argued by learned counsel for relators that the bill for injunction did not state facts sufficient to constitute a cause of action in divers particulars, hence prohibition lies. We will not cumber this opinion by enumerating them, for they one and all may be grouped together and held to amount to one, namely, either the bill was demurrable, or was subject to a motion to make more definite and certain what was obscurely alleged or only inferentially charged.

As to that we say: The sufficiency of the petition was not challenged by demurrer below. The court, so far as we can see, made no ruling on its sufficiency. How it might rule in due course is hidden in the womb of the future, and is discoverable only by the event, barring the occult vision of a seer, which latter we utterly disavow as a judicial attribute. It has been held in some cases, on the facts present in those cases, that if the sufficiency of the petition has been challenged in the circuit court and ruled adversely to demurrant so that it was settled once for all that the trial court entertained an erroneous view in excess of its jurisdiction and was going to put it in force, the remedy by prohibition might be invoked. But, on such facts as we are now dealing with, there is a better doctrine applicable to this extraordinary remedy, one finding abundant place in our decisions, to the effect that the circuit court does not lose jurisdiction by mere error in ruling on a demurrer or otherwise when such error is correctible on appeal or writ of error. We need not pursue that line of thought because the record we are dealing with is no such record. In this case we

are, in effect, asked to anticipate the ruling of the judge on the sufficiency of the bill, or on the facts, correct imaginary errors in his future rulings, and take over jurisdiction to ourselves, not only on the sufficiency of the bill, but on the merits, as an intermediate step arresting the evolution of a case pending below. That we ought not to do this is, we think, well within the doctrine and reasoning of a line of cases. [State ex rel. v. McQuillin, 256 Mo. l. c. 702 et seq.; State ex rel. v. McQuillin, 260 Mo. l. c. 176.] Says BOND, J., speaking acceptably for us all in the latter case: "We must assume that the said court will conduct the proceedings before it according to correct principles of law and equity, and, if the hearing should disclose no matter for which relief could be given, it will be denied or *vice versa*." To the same purpose are the *rationale* and judgments in State ex rel. v. Scarritt, 128 Mo. l. c. 338; Schubach v. McDonald, 179 Mo. l. c. 182; State ex rel. v. Southern Ry. Co., 100 Mo. l. c. 60 et seq.; State ex rel. v. Gill, Judge, 137 Mo. 681; State ex rel. v. Gates, 190 Mo. l. c. 553 et seq.; State ex rel. v. Stobie, 194 Mo. l. c. 52; State ex rel. v. McQuillin, 256 Mo. l. c. 702 et seq.

On prohibition the determinative question here is not one of mere pleading below, where pleadings are amendable (and often need amendment). It rises to the dignity of one of jurisdiction in the strictest sense. In that view of it, in the Schubach-McDonald case, *supra*, are pertinent observations, viz.:

"The matter, therefore, compresses itself into the question whether or not a basic subject-matter, over which a court of equity has jurisdiction, was presented to the circuit court for adjudication by the injunction suits. That is, whether a matter was presented which that court has power to deal with, and not whether such a matter was inartificially or defectively presented. In other words, the question is one of jurisdiction and not of pleading, for if the court had jurisdiction over the

subject-matter, it had the power to decide whether the pleadings are or were not properly drawn, and also to decide whether or not the plaintiff was entitled to the relief sought. If a court has the power to act, its jurisdiction is in nowise impaired by the consideration whether it acted in accordance with the law or erroneously. Given the jurisdiction, all else is a mere matter of error, to be corrected on appeal. Or, further illustrated, if the court has jurisdiction over the subject-matter, it has the power to decide whether the petition does or does not state a cause of action, and the mere failure of a petition to state a cause of action or the defective statement of a good cause of action, in no way affects the jurisdiction of the court." So, in State ex rel. v. Scarritt, supra:

"The writ cannot rightly be employed to compel a judicial officer, having full jurisdiction over the parties and a cause, to steer his official course by the judgment of some other judge, or to substitute the opinion of another court for his own in dealing with topics committed by the law to his decision. [In re N. Y., etc., Steamship Co. (1895), 155 U. S. 523.]"

The questions learnedly discussed by counsel *pro* and *con* not only on the merits but on the sufficiency of the bill were all for disposition below in the first instance, and not for disposition here by a side stroke on prohibition. We have purposely avoided discussing them, so that we may not put the trial chancellor in leading strings when on some interlocutory step or on final hearing when all the facts are in, he comes to decide this or that one of them.

The premises considered, the preliminary rule is quashed and the permanent writ denied. It is so ordered. All concur but *Woodson, J.*, who dissents.

ALICE HUNT v. ST. LOUIS & SAN FRANCISCO
RAILROAD COMPANY, Appellant.

In Banc, December 1, 1914.

NEGLIGENCE: Contributory: Asleep Near Railroad Track: Train Violating Speed Ordinance. The defendant's railroad enters the city of Cape Girardeau 130 feet north of Sloan creek, and for about 800 feet north of the bridge over that creek the track is straight. A city ordinance puts the speed limit at five miles an hour within the city limits. At 1:30 a. m. the defendant's passenger train rounded the curve north of Sloan creek running forty miles an hour, and when about 700 feet north of the bridge the engineer saw the plaintiff's husband lying near the track. The engine struck and killed him while it was running, the engineer says, perhaps fifteen or eighteen miles an hour. The plaintiff's petition, in her suit for damages, contained two counts, the first based on the humanitarian doctrine, the second on a violation of the speed ordinance. The jury found for the defendant on the first count, and for the plaintiff on the second. The defendant alone appeals. *Held*, that the judgment must be reversed, the evidence showing contributory negligence on the part of deceased as a matter of law, in that he must have been asleep with his head almost upon the rail. [LAMM, C. J., and WALKER, J., dissenting.]

Appeal from Cape Girardeau Circuit Court.—*Non*
Henry C. Riley, Judge.

REVERSED.

W. F. Evans, Moses Whybark and A. P. Stewart
for appellant.

(1) The case was one of mutual fault, to say the least of it, and the law will not cast all the consequences on the defendant, nor will it attempt any apportionment of it. *Zumault v. Railroad*, 175 Mo. 288. In this case *Zumault* at night, while waiting for a train, sat down on the platform and went to sleep, and was struck by a train. (2) The deceased lived near the railroad, a few feet from it, and knew of approaching trains, yet

he lay down—all of his body off the track and his head resting on the west rail. He knew that trains would pass, and their time at that point, and plaintiff is not entitled to recover. The law is well settled that where one even negligently places himself in front of a rapidly approaching train and is injured thereby, he cannot recover if the employees in charge of the train used reasonable care to avoid the injury, after they discovered his perilous position, or by the exercise of ordinary care might have discovered it. *Harlan v. Railroad*, 64 Mo. 483. When one wilfully exposes himself to danger and is injured, there is no liability no matter what the result may be. *Prewitt v. Eddy*, 115 Mo. 283; *Prewitt v. Railroad*, 134 Mo. 632; *Moore v. Railroad*, 126 Mo. 276; *Pope v. Railroad*, 242 Mo. 232.

Edw. D. Hays and *David B. Hays* for respondent.

(1) Appellant undertakes to shift responsibility on the theory of mutual fault, along with the suggestion that the law will not attempt to divide or apportion the fault. But it was within the province of the jury to determine the question of contributory negligence from the evidence offered; and the burden of establishing such contributory negligence was properly rested on the defendant asserting it. *Prewitt v. Railroad*, 134 Mo. 615; *Thompson v. Railroad*, 243 Mo. 336.

(2) Regardless of the facts in the case the defense of contributory negligence is not open to the defendant. In the answer to the second count of plaintiff's petition, being the count on which plaintiff recovered, defendant did not admit negligence and seek to excuse it. The answer was an outright denial of any negligence whatever on the part of defendant. Any plea of contributory negligence must be a plea of confession and avoidance. *Allen v. Transit Co.*, 183 Mo. 411; *Ramp v. Met. St. Ry.*, 144 Mo. App. 1. (3) Violation of such ordinance is negligence *per se*. *Jackson*

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v. Railroad, 157 Mo. 621; Prewitt v. Railroad, 134 Mo. 615; Hutchinson v. Railroad, 161 Mo. 246; Sluder v. Transit Co., 189 Mo. 107; Stotler v. Railroad, 200 Mo. 107; Sec. 9233, R. S. 1909. A railroad inviting the use of its track for pedestrianism must use care to correspond with the circumstances. Murphy v. Railroad, 226 Mo. 56; Fearons v. Railroad, 180 Mo. 208; Schaaf v. St. L. B. & B. Co., 151 Mo. App. 35; Thompson v. Railroad, 243 Mo. 336.

BLAIR, C.—Plaintiff recovered judgment for \$3000 as damages for the death of her husband, George Hunt, and defendant appealed. The petition contains two counts—one invoking the humanitarian doctrine and the other alleging that Hunt's death was due to defendant's negligence in violating an ordinance of the city of Cape Girardeau restricting the speed of trains to five miles per hour.

The answer contained, among other things, a plea of contributory negligence.

At the close of plaintiff's evidence and again at the close of all the evidence in the case defendant requested the trial court to direct the jury to find for it on both counts and excepted to the refusal to do so. On the first count the jury expressly found for defendant and thus denied plaintiff's right to recover on the humanitarian doctrine. The verdict was for plaintiff on the second count, and it is with that count alone we are now concerned. It is contended the evidence pertinent to the issues under the second count is not sufficient to support the verdict rendered thereon.

The relevant facts are as follows: Defendant operates a railroad passing through Cape Girardeau from north to south and entering the city at a point about 130 feet north of Sloan Creek in that city, and an ordinance of the city was in force restricting the speed of trains to five miles per hour within the city limits. On

the night he was killed, Hunt had been drinking and about midnight started home accompanied by two acquaintances. The three proceeded north across the railroad bridge over Sloan Creek and thence along the track a few feet to a point where a cinder path led westwardly from the track, and there, about twenty or thirty minutes after midnight, Hunt's companions left the railroad and went to a brothel where they spent the remainder of the night. When these men left him Hunt "started like he was going on up the track home" and they supposed he did so but gave him no further attention. One of them testified that just before they left him Hunt was "staggering to some extent" and was somewhat under the influence of liquor. About an hour and ten minutes thereafter one of defendant's trains struck and killed Hunt. The train ran 240 to 250 feet farther and stopped. Hunt's body was found very near the spot where his two companions left him but on the west side of the track, a few feet north of a switchstand, his head lying very near the north end of the trestle which forms the north approach to defendant's bridge over Sloan Creek. A bundle of clothing, probably a suit of overalls in which Hunt worked, lay five or six feet north of the body and between the rails. There was a little blood on the west rail and there was a pool of blood west of the track at the point where Hunt's head rested after he was struck. The upper front quarter of the right side of the man's head was stricken or crushed off. There were no other wounds of any consequence on the body. There was no external evidence of previous violence. So far as plaintiff's evidence is concerned there was nothing to show the speed at which the train was running when it struck Hunt unless it can be said to be inferable from the distance the train ran after striking him and the testimony that such a train running ten miles an hour could be stopped in about 150 or 300 feet. There was, however, no evidence for plaintiff tending to show whether

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the brakes were applied before, at the time or after the engine struck Hunt.

For defendant the engineer who had charge of the train which killed Hunt testified that the track north of Sloan Creek was straight for about 800 feet; that about 1:38 a. m. he rounded the curve and came out upon this tangent at the rate of forty miles per hour; that when his engine reached a point about 700 feet from the north end of the bridge he saw what he suspected to be a man lying with his head on or near the west rail and near the north end of the bridge and immediately made every effort, consistent with the safety of his train, to stop, but was unable to do so, though he reduced the speed of the train so that it was running about fifteen or eighteen miles per hour when Hunt was struck; that Hunt was lying with his head on a bundle of clothing on or near the west rail, his head partly over the rail; that his face was upward and his body and feet extended westward and away from the track; that Hunt did not move at all but lay supine until the step attached to the pilot, and about four and one-half or five inches above the rail, struck him; that it was this step which inflicted the wound above described, and an examination thereafter disclosed that it was bent and had blood and hair upon it; that the force of the blow turned the body somewhat and turned it partially around.

The violation of a valid and applicable city ordinance restricting the speed of trains is negligence *per se*, and substantial evidence of such violation plus like evidence of a causal connection between such negligence and an injury is sufficient to sustain a verdict against the violator, all issues being properly submitted, unless contributory negligence appears as a matter of law.

Contributory
Negligence:
As Matter
of Law:
Asleep Near
Railroad
Track.

In this case the position of the body after Hunt was struck, its nearness to the rail, the nature of the

wound which caused his death and the absence of other wounds save such scratches and bruises as were necessarily incident to his being hurled upon the cinders beside the track, demonstrate that Hunt must, when struck, have been lying with his head on or near the west rail of defendant's track and must have been struck in some such manner as the engineer testified he was. The plaintiff's evidence shows that an examination of Hunt's head disclosed that the "skull was gone down on the forehead just above the eye and the edge of the wound was just about the middle of the forehead, extending upward and backward, including the forward fourth of the right side;" to that extent "the skull was missing; it was cut off on the right side down to the eye-brow just about in the center, about one-fourth of the skull above the ear; not back of the ear to any extent; . . . only a portion of the brain was there." It is inconceivable that a car or engine wheel could have thus crushed or cut a corner out of a man's skull, and it is impossible that Hunt could have been sitting or standing when he received the wound described without receiving others on his trunk and limbs, unless he stood beside the track and held his head out over it, an inference which would destroy plaintiff's case at once. There is no escape from the conclusion that Hunt was lying with his head against or upon the rail. There is evidence on plaintiff's part that he (Hunt) was in good health and there is no intimation that he was subject to epilepsy or any other like ailment. Defendant offered some evidence that Hunt was dead before the engine struck him, but this could not aid plaintiff. The testimony by which defendant attempted to show that Hunt and one Fields were on bad terms was not sufficient to warrant an inference that Hunt had met with violence and had been placed on or near the track, particularly in view of the absence of any external evidences of violence save those naturally incident to the blow delivered by defendant's

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engine. If Hunt was awake and lying on or beside the track there could be, of course, no recovery. The only theory there is really substantial evidence to support is that Hunt was asleep on or near the west rail of the track. Whether he was drunk or sober is, in that event, of no consequence. [Murphy v. Railroad, 228 Mo. l. c. 82.] It is settled law that "lying down upon a railroad track is obviously the grossest negligence, which nothing can well excuse" (2 Shearman & Redfield, Negl. [6 Ed.], sec. 480) and while the humanitarian doctrine applies to one who has thus exposed himself to injury, yet the jury in the case found against plaintiff on that theory, and it cannot be further considered. One who lies down and goes to sleep upon the track of a railway over which trains are likely to pass cannot possibly be said to do so in reliance upon the company's obligation to observe an ordinance limiting the speed of trains, and the cases cited in which persons were injured while lawfully relying upon such observance are not applicable. The negligence of the company in running its train in violation of the ordinance clearly would have resulted in no injury to Hunt except for his own contributory negligence in placing himself, in the night, upon the track. Whatever duty defendant owed persons walking upon the track its violation of the speed ordinance was but simple negligence in the circumstances of this case, liability for which is subject to be defeated by the contributory negligence of the injured person.

The closing paragraphs in the opinion in Trigg v. Water, Light & Transit Company, 215 Mo. l. c. 544, lay down the rule applicable here. In that case no speed ordinance was violated but it was contended the rate of speed was negligent under the common law. This difference does not affect the applicability to this case of the rule approved in that. A valid ordinance restricting the speeds of trains simply makes a speed violative of it negligent as a matter of law; whereas, in

the absence of such an ordinance, it is usually for the jury to say whether the rate was a negligent one, all the circumstances being considered. After the jury find, in the absence of such an ordinance, that a train was moving at a speed which in the circumstances was negligent, the effect of the negligent speed, so far as the question here involved is concerned, is exactly the same as if a speed ordinance had been violated.

The case last cited and that of *Sullivan v. Railroad*, 117 Mo. l. c. 224, and cases cited, disclose that under the law this judgment must be reversed. *Brown, C.*, concurs.

PER CURIAM.—This cause coming into Banc on a dissent, the foregoing opinion of *BLAIR, C.*, is adopted as the opinion of the court. All the judges concur, except *Lamm, C. J.*, who dissents in separate opinion in which *Walker, J.*, joins.

DISSENTING OPINION.

LAMM, C. J.—Plaintiff sued in two counts for the negligent death of her husband.

The first is bottomed on the theory that (because of the customary use of the place by footmen—a bridge or trestle in Cape Girardeau where the defendant maintained a planked footway) it was the duty of defendant to keep an outlook there, but that it neglected its duty; that decedent being exposed to peril there, defendant negligently struck and killed him by running a locomotive against him; that defendant's agents and servants in charge of its locomotive saw decedent in peril, or by the exercise of ordinary care might have seen him in peril, in time to have stopped the locomotive before striking him, but, negligently failing to keep an outlook and failing to stop, struck decedent and killed him.

The train was running very fast, and the testimony tended to show that defendant did keep an outlook and did see decedent, and that though decedent was seen by the engineer lying on the rail the rise of seven hundred feet away, yet the locomotive, at its going rate of speed, could not be stopped in that distance. There was testimony that defendant did what it could to stop, and some from which a contrary conclusion was inferable, but the jury found for defendant on the first count and plaintiff took no exception and no appeal. Therefore trial instructions and theories applicable only to that count fall out of the case.

The second count declared on a violation of a city ordinance forbidding a train speed in excess of five miles an hour within the limits of the city of Cape Girardeau, and ascribes the death of decedent to a negligent violation of that ordinance.

The jury found for plaintiff on the second count and assessed her damages at \$3000, but our learned Commissioner reaches the conclusion that because the jury found for defendant on the first count such verdict necessarily precludes a recovery on the second, accordingly the judgment is reversed outright without remanding the cause. I cannot agree that such conclusion is sound and the object of this dissent is to state, in part, my reasons for that position.

I do not say there is no error in propositions of law put to the jury on plaintiff's behalf or in those refused for defendant. I say nothing at all on that score. This for the reason that our learned Commissioner's opinion does not turn on any such question and this includes the reasonableness of the ordinance (a much agitated point in appellant's brief). It lays such question out of view and this dissent does as it does. In other words, if our Commissioner has fallen into error in reaching his conclusion, then other questions remain to be considered before affirmance. If not, then those

other questions are not decisive, and to put them aside and reserve the propositions is well enough.

As premises to reason from, the following may be assumed:

(1) That the speed ordinance was proved as pleaded.

(2) That its flagrant violation was proved at the time and by the locomotive in question.

(3) That there was evidence conclusively showing that if the ordinance had not been violated the accident would not have happened; for on this record decedent was seen by the engineer in a position of peril and (unconscious of it) more than seven hundred feet away, and if the ordinance had been obeyed the locomotive, under existing circumstances of train equipment, weather and grade, could have been stopped in fifty feet. At its actual speed rate it could not be stopped (so the jury found in their verdict on the first count) and warning was unavailing because decedent was unconscious through sleep, sickness or injury by foul means.

(4) That the *locus in quo* was in the corporate limits of Cape Girardeau sufficiently appears.

(5) That the locomotive killed decedent sufficiently appears; for that, though there was testimony directed to the theory that decedent was dead when struck by the locomotive, there was also evidence *contra* and the jury decided against defendant on the issue.

We have, then, a case where the death of a man directly results from the violation of a speed ordinance under circumstances where a duty to not kill him, if by ordinary care his death could be avoided, was imperative.

In determining liability or nonliability in the case put, we may put to one side some other issues, *viz.*:

First, the negligence or non-negligence of decedent in putting himself in peril. This issue falls out of

the case on appeal because, on testimony both ways his non-negligence was found by the jury on an issue put to them. Not only so, but admitting decedent's negligence in putting himself in peril an hour before his death and staying in peril, then there is no principle of law allowing him to be killed, *when his peril is discovered and he is unconscious of it*, as here, if by ordinary care his death could have been avoided. This man obviously could not help himself and did not intend to try. No one who saw him could have two opinions on that. It was as plain as a pike staff. Alarms were idle. Stopping was the only thing that would save the unconscious man. In such case decedent was a brother of defendant and defendant was that brother's keeper up to the full measure of ordinary care. I will recur to "ordinary care" further on, and the scope of it as it is given to me to see it.

Second, we may put to one side the duty to stop *at the rate defendant was running its locomotive*; for it could not stop and the jury so decided when it found for defendant on the first count. If, then, ordinary care began only with discovery of peril (which I deny) we confront inability to stop and the case is at an end. But does that view broadly meet the demands of justice or put an end to the case on the second count bottomed on negligent speed in violating the ordinance? So held our Commissioner and at that point we part company.

Because: In the first place, to so hold results in the anomaly that the more the law is violated (i. e., the greater the speed and consequent inability to stop) the greater the immunity from liability for destroying life—an unthinkable proposition. It would be to encourage lawless speed, and the more lawless the better—a theory against all morals and ethics. It would be for the law to say: Break the law, break it flagrantly; for, behold, the more lawless the speed, the

more lawful the killing caused thereby—another unthinkable proposition.

If we ever announce that doctrine we strike the life out of every speed ordinance in Missouri. To illustrate, the object of those ordinances is not only to save life and limb, but to make it possible to save life and limb. But we say, run so fast in towns that you cannot stop where life and limb are likely to be or are in peril, and you are acquit of liability. How long would one of those ordinances be effective in creating a civil liability for negligence in the face of such ruling? A pestiferous syllogism it would be to announce: Ability to stop creates liability. Fast running creates inability to stop. Inability to stop creates immunity. Hence, break the speed ordinance and be acquit.

Nor need we bother with the question of the duty to look out for decedent. The engineer *saw* him, that was one fact on which liability hinges. Closer home, he saw him in time to stop if he had been obeying the law. That was a remaining and necessary fact to fasten liability on defendant. Shall it be allowed to set up its servant's lawless act that it may escape liability and thereby profit by its own wrong? Thereto the maxims are abundant and cover every angle of the matter; for example: A man should not be benefited by his own wrongdoing. A right does not arise from a wrong. The law hateth wrong. No one can improve his condition by his own wrong. No one can take advantage of his own wrong.

Any process of reasoning leading up to that conclusion must be unsound, because the conclusion is absurd. The right doctrine is: Good reasoning leads to correct results; if, then, the results be incorrect the reasoning is bound to be unsound; for are not the general principles of the law the very perfection of reason?

In the second place, there is no complaint here of improper joinder of causes of action, or that the peti-

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tion does not state a good cause of action in each count. If, now, plaintiff had sued in only one count and that one for a breach of the ordinance and had shown, as here, a causal connection between the death and a breach, she would have made a case, barring such contributory negligence by decedent as would be a joint proximate cause of his own death. How comes it, then, that with the first count eliminated by the verdict of the jury her second count by that token alone also falls? Does her case not stand precisely in that event as if she had not sued on her first count at all? I think so and can allow no such potency to the verdict of acquittal on the first count as ascribed to it by the principal opinion, viz., that of striking down both counts and thereby killing two birds with one stone.

In the third place, defendant assigned fifteen reasons for reversing the judgment. Observe what they were. The first four attacked the constitutionality of the new damage act; the fifth complains of the refusal of an instruction whereby the reasonableness of the speed ordinance was put to the jury; the sixth is by way of argument to the effect that decedent went to sleep on the track without relying on a lawful train speed; the seventh argues the ordinance was habitually violated and decedent knew that fact; the eighth puts the matter from the standpoint of a mutual fault; the ninth argues that the doctrine of the Trigg case, 215 Mo. 521, and Ayers case, 190 Mo. 228 (both distinguishable from this), applies; the tenth argues decedent willfully exposed himself to danger; the eleventh argues that drunkenness did not excuse him; the twelfth complains of an instruction on the burden of proving the issue of contributory negligence; the thirteenth is like unto the last above; the fourteenth complains of another instruction; the fifteenth complains of error in admitting evidence.

To my mind it is of stiff significance that in none of those grounds for reversal did veteran counsel make

the point now made by our learned Commissioner. What *they* could not see with eyes brightened and freshened by the tears (I speak, of course, in figure only) of defeat, should *we* see? Why be astute to that end? Or, if we think we see it, are we not likely to see only a will o' the wisp? Under our rules they were not allowed to argue a point not made in their briefs. Shall we argue it for them?

In this connection I stress the proposition that the contributory negligence of decedent as a causal factor in his death was squarely put to the jury and the fact was found against defendant. In that view of it, shall we say, on conflicting proof, as here, that decedent as a matter of law was guilty of such contributory negligence as destroys liability? One of defendant's theories was that it did not kill the man at all. That he was killed by some one else. That issue was put to the jury and was found for plaintiff. He may have been wounded by an enemy (and the proof made that not a wild speculation) but the locomotive on this record must be taken as the thing that killed him.

Recurring now to ordinary care, all must admit defendant owed it to decedent. It owed him, then, care according to circumstances. It owed him such care as an ordinarily reasonable, prudent man would exercise under the same or similar circumstances. As suggested heretofore the question is: When did ordinary care begin to operate as a factor? The principal opinion, it seems to me, acquits defendant if it used ordinary care in stopping after the peril was discovered. Is not that too close a view? Does not reason push it back of that? It began sooner. Ordinary care *began with the rate of speed* and required obedience to the law so that ordinary care in stopping would have a chance to fill its due office. If, now, disobedience to the law make it impossible to stop, though ordinary care in the mere matter of stopping was used, shall defendant be absolved for carelessly putting it out of its power

to stop? That would be, as heretofore said, an invaluable excuse for lawbreaking. Nay more, and most of all, it would be a suggestion to break the law and thereby escape liability and avoid duty. I think it would make of the law (not a rule of action, but) what some wise old Latin said of the nightingale, viz.: *Vox, et praeterea nihil*, which a scholar tells me means, if liberally Englished, a voice and nothing but a voice. In my opinion ordinary care in this case involved the concept of using ordinary care in speed so that ordinary care in stopping would result in attaining the benevolent purposes of the ordinance. These two phases of ordinary care belong in the case. They are, I submit, inseparable in logic and inseparable in common sense. They sit like "two kings of Brentford on one throne."

Wherefore I dissent, *Walker, J.*, joining me in so doing.

GEORGE W. WELLMAN, Trustee in Bankruptcy of
Estate of CHRIS VON DER AHE, Appellant,
v. KAISER INVESTMENT COMPANY et al.

Division One, December 2, 1914.

1. **FRAUDULENT CONVEYANCE: Purpose: Full Value: Wife Preferred.** Even though the grantor was hopelessly insolvent at the time he conveyed the property to his wife, and the evidence tends strongly to prove the transfer was made to defraud his other creditors, yet if the grantor was justly indebted to the wife at the time, and the sum of that indebtedness, together with the existing mortgages against the property which she assumed, aggregated an amount equal to or in excess of its then value, the conveyance to her will not be set aside as fraudulent as to his other creditors.
2. ———: **Valid Indebtedness: Breach of Promise Notes: Future Marriage.** The fact that a transfer of his property by the husband to his wife was made in consideration in part of the surrender to him of notes given by him to her in settlement of her suit for breach of his promise to marry her brought

by her against him prior to their marriage, does not render the conveyance fraudulent, nor did the subsequent marriage invalidate such indebtedness.

3. ———: ———: ———: ———: **Presumption of Gift: Lending Notes to Be Used as Collateral Security.** In view of the statute declaring that all gifts of money or property by the wife to her husband not in writing shall be void, a delivery to him by her of notes of a third party given her by him in settlement of her suit for breach of his promise to marry her brought before their marriage, would ordinarily raise the presumption of payment, but where it is clear that her intention was to lend the notes to him in order that he might use them as collateral security for the payment of money to be borrowed by him, no presumption of payment will be indulged.

Appeal from St. Louis City Circuit Court.—*Hon. Moses N. Sale*, Judge.

AFFIRMED.

Kelley & Starke for respondents.

(1) A failing or insolvent debtor has the right to prefer one creditor over another, even though the effect of the preference is to hinder and delay other creditors, and even though the creditor has knowledge that the debtor intended to hinder, delay or defraud his creditors. *Growney v. Lowe*, 234 Mo. 696; *Stahlhuth v. Nagle*, 229 Mo. 582; *Gust v. Hoppe*, 201 Mo. 300; *Wall v. Beedy*, 161 Mo. 637; *Bank v. Fry*, 216 Mo. 34; *Alberger v. White*, 117 Mo. 363; *Sexton v. Anderson*, 95 Mo. 379; *Albert v. Besel*, 88 Mo. 150; *Shelley v. Boothe*, 73 Mo. 74. (a) A debt due from a husband to his wife stands on as good footing as a debt due to any other person and she may be given a preference over other creditors. *R. S. 1909*, sec. 8304; *Cole v. Cole*, 231 Mo. 255; *Rice-Stix & Co. v. Sally*, 176 Mo. 107; *Schufeldt v. Smith*, 131 Mo. 288; *De Berry v. Wheeler*, 128 Mo. 89; *Seay v. Hesse*, 123 Mo. 462; *Hart v. Leete*, 104 Mo. 315; *Riley v. Vaughan*, 116 Mo. 176; *Woolen Mills v. Wilson*, 87 Mo. App. 145. (b)

There is a very material distinction to be observed between one who purchases for a fresh consideration and one who purchases merely to secure a pre-existing debt. The position of a creditor is in this respect better than that of a purchaser. *Gust v. Hoppe*, 201 Mo. 300; *Wall v. Beedy*, 161 Mo. 637; *Alberger v. White*, 117 Mo. 365; *Sexton v. Anderson*, 95 Mo. 373; *Morgan v. Wood*, 38 Mo. App. 264; *Deering & Co. v. Collins & Son*, 38 Mo. App. 79. (2) *Chris Von der Ahe* was entitled to a homestead in the equity in the real estate in question over and above the \$11,000 deed of trust thereon on and prior to the 3rd day of September, 1902, which was the date on which he conveyed his equity in said real estate to his wife, *Anna K. Von der Ahe*, in payment of the \$4800 he owed her. *Speery v. Cook*, 247 Mo. 132; *Sharp v. Stewart*, 185 Mo. 529; *Finnegan v. Prindeville*, 83 Mo. 517; *Zollinger v. Dunaway*, 105 Mo. App. 36; *Tennent v. Pruitt*, 94 Mo. 145. (3) The deeds from *Chris* and *Anna K. Von der Ahe* to *John S. King* and from *King* to *Anna K. Von der Ahe*, dated September 3, 1902, by which *Chris Von der Ahe's* title to his equity in the real estate in question was conveyed to said *Anna K. Von der Ahe* in payment of her legal debt against him, amounting to \$4800, were valid conveyances made to prefer her as a creditor. (a) The fact that said deeds recited a consideration of \$1000 makes no difference, because it is competent to show, and was shown by the uncontradicted parol testimony that the real consideration of said deeds was a prior legal indebtedness from *Chris Von der Ahe* to *Anna K. Von der Ahe* amounting to \$4800. Deeds supported by such consideration are not voluntary conveyances. *Clark v. Lewis*, 215 Mo. 190. (4) The relationship of the parties and the insolvency of the grantor are not sufficient to establish fraud. *Robinson v. Dryden*, 118 Mo. 539. A finding of fraud can never be based on mere presumption. When an act may be as fairly attributed to good mo-

tives as well as to bad, a proper motive is presumed to exist. *Lumber Co. v. Crommer*, 202 Mo. 521; *Kilpatrick v. Wiley*, 197 Mo. 159; *Bank v. Worthington*, 145 Mo. 100; *Webb v. Derby*, 94 Mo. 629; *Robinson v. Dryden*, 118 Mo. 534.

D. J. O'Keefe for appellant.

(1) Insolvency of debtor at the time of transfer of property sufficiently appears from the evidence. 14 Am. & Eng. Ency. Law, 308; *Walsh v. Ketchum*, 84 Mo. 427; *Hoffman v. Nolte*, 127 Mo. 120. (2) No consideration passed from defendant *Anna K. Von der Ahe* to her husband, the bankrupt, at the time of the transfer of the real estate, nor was there any existing debt in favor of defendant *Anna K. Von der Ahe* established by the evidence which would validate the transfer of real estate. *Sloan v. Tory*, 78 Mo. 623; *McClain v. Abshire*, 63 Mo. App. 333; *Hoffman v. Nolte*, 127 Mo. 120; *Patton v. Bragg*, 113 Mo. 595; *Martin v. Estes*, 132 Mo. 402; *Shelly v. Booth*, 73 Mo. 74; *Frank v. Curtis*, 58 Mo. App. 349; *McKenny v. Wade*, 43 Mo. App. 152; *Forwell v. Meyer*, 67 Mo. App. 566; *Mayberg v. Jacobs*, 40 Mo. App. 128; *Simmons v. O'Neal*, 60 Mo. App. 530. (3) Discrepancy in consideration mentioned in deed is a badge of fraud. Sec. 2881, R. S. 1909; *Benne v. Schnecko*, 100 Mo. 256; *Bump on Fraudulent Conveyances* (3 Ed.), pp. 34, 42, 51, 306. (4) Sale under *Winkelmeyer* deed of trust was but a scheme to relieve real estate in question from the outstanding inchoate right of dower in bankrupt's first wife and of the judgment lien upon the property in favor of *Pendleton et al.* and *Broadhead* to use. (5) Property in question stood in the same position in reference to bankrupt's creditors after sale under deed of trust as before said sale, no person holding record title to said property after said sale had paid anything of value, there being but a substitution

of the deeds of trust placed thereon by Helen Caldwell for the deed of trust thereon held by Winkelmeyer. (6) The bankrupt Von der Ahe never had a homestead right in the real estate as against debts of Pendleton et al., Broadhead to use and the Anheuser-Busch Brewing Association, all of which were contracted while bankrupt was a single and unmarried man and at a time when bankrupt had abandoned any prior homestead right he may have had in this real estate. The real estate in question was over three times in size that permitted to be held under the law as a homestead. Secs. 6704 and 6711, R. S. 1909; Smith v. Bun, 75 Mo. 563; Kaes v. Gross, 92 Mo. 655; Snodgrass v. Capple, 131 Mo. App. 351.

WOODSON, P. J.—The plaintiff, as trustee in bankruptcy, of the estate of Chris Von der Ahe, instituted this suit, creditor's bill, in the circuit court of the city of St. Louis, to set aside and for naught hold certain deeds of conveyance mentioned in the pleadings and evidence, conveying the real estate in controversy, situate in the city of St. Louis, on the ground of fraud, and to recover same from the defendants, the present title to which now rests in the defendant Kaiser Investment Company.

The substance of the pleadings are briefly and fairly stated by counsel for appellant in the following language:

“Plaintiff's amended petition, upon which trial was had, states that in the year 1898 and for some time prior Chris Von der Ahe was the owner of certain real estate in the city of St. Louis, Missouri, being a lot of ground in city block 2386, beginning at a point on the north line of St. Louis avenue 105 feet and 10 inches west of the west line of Grand avenue and running westwardly along the north line of St. Louis avenue 145 feet more or less to the west line of lot nine

of said block; thence northwardly and parallel with the west line of Grand avenue 115 feet to an alley fifteen feet wide; thence eastwardly and parallel with St. Louis avenue 145 feet to a point; thence southwardly and parallel with Grand avenue 115 feet to the north line of St. Louis avenue, the point of beginning.

“That on the 8th day of December, 1894, Chris Von der Ahe and Emma Von der Ahe, his wife, executed a deed of trust on this real estate in favor of David J. Hayden, trustee, to secure the payment of certain promissory notes of the sum of \$11,000.

“It is further charged in the petition that bankrupt Chris Von der Ahe, prior to 1898, became indebted to the extent of \$21,000 to creditors represented by the trustee in this action, a portion of which were proven against bankrupt estate to the extent of over \$12,000 in all. A large portion of the debts proven were contracted prior to the year 1898.

“It further appears from the plaintiff’s amended petition that the bankrupt, together with the defendant Anna K. Von der Ahe, who was then and is now the wife of said bankrupt, on the 29th day of January, 1900, conveyed all of the aforementioned real estate to the defendant Max Kaiser for a pretended consideration of \$1000; that on the same day defendant Max Kaiser conveyed the said real estate to defendant Anna K. Von der Ahe for a pretended consideration of \$1000, both of which deeds were recorded in the office of the recorder of deeds in the city of St. Louis, Missouri, on the 22d day of May, 1902; and that on the 3rd day of September, 1902, bankrupt Chris Von der Ahe and his wife, the defendant Anna K. Von der Ahe, conveyed the same real estate to John S. King for a pretended consideration of the sum of \$5, and in confirmation and in recognition of the deeds from bankrupt Von der Ahe and his wife, defendant Anna K. Von der Ahe, to defendant Max Kaiser, and from Max Kaiser to the defendant Anna K. Von der Ahe, for a pretended con-

sideration of the sum of \$5, and in confirmation and in recognition of the aforementioned deeds executed on the 29th day of January, 1900, from bankrupt Von der Ahe and his wife, defendant Anna K. Von der Ahe, to defendant Max Kaiser, and from the defendant Max Kaiser to the defendant Anna K. Von der Ahe, which later deeds were recorded on the 3rd day of September, 1902.

“It is further charged in plaintiff’s amended petition that on the 10th day of December, 1903, the said real estate was sold by the trustee under the deed of trust executed by the bankrupt and his first wife, Emma Von der Ahe, for a pretended consideration of \$10,000, to Christiana Winkelmeyer, the owner of the deed of trust, who in turn, on the same day, conveyed said real estate to Helen Caldwell, who is the defendant Helen Caldwell How, for a pretended consideration of \$11,500, who in turn, on the 14th day of December, 1903, executed three first deeds of trust on this real estate to August Gehner, trustee for John A. Tomhagen, to secure the payment of principal notes aggregating \$10,500, and the interest to accrue thereon; that on the 15th day of December, 1903, said defendant Helen Caldwell How executed a second deed of trust on all of this real estate to August Gehner, trustee for John A. Tomhagen, to secure payment of principal notes aggregating \$2025; that on the 4th day of January, 1904, the defendant Helen Caldwell How transferred the remaining equity in this real estate to the defendant Kaiser Investment Company; that all of these conveyances were duly recorded in the office of the recorder of deeds in the city of St. Louis, Missouri.

“It is further charged in the petition that James M. Franciscus, Charles C. Kunz and Robert A. Quackeboss, at the instance and request of the bankrupt Von der Ahe and his wife, defendant Anna K. Von der Ahe, and defendant Max Kaiser, organized the defend-

ant Kaiser Investment Company, a corporation, under the laws of the State of Missouri, for the purpose of receiving and holding the legal title to this real estate, and subsequently transferred to the bankrupt Von der Ahe and his wife defendant Anna K. Von der Ahe, and defendant Max Kaiser, all of the shares of stock of said corporation; that the purpose and effect of all of these conveyances other than the first deed of trust executed by the bankrupt Von der Ahe and former wife Emma Von der Ahe, was to hinder, delay and defraud the creditors of the bankrupt Chris Von der Ahe, and prayed for a decree setting aside all of said conveyances and to declare the real estate to be the property of bankrupt Von der Ahe, and ordered sold for the payment of the indebtedness of said bankrupt, subject to certain deeds of trust executed by Helen Caldwell, provided the court found that they were valid and subsisting liens on said real estate and that defendants be required to account for the income from said real estate and for such other and further relief as may under the premises to the court seem meet, just and proper.

“Defendant Anna K. Von der Ahe, answering plaintiff’s amended petition, filed a general denial, with admissions that bankrupt Von der Ahe was in the year 1898 and for some time prior thereto the owner of the real estate mentioned in plaintiff’s amended petition, the execution of the deed of trust by bankrupt Von der Ahe and his wife, Emma Von der Ahe, on the 8th day of December, 1894, and alleges that the conveyances of bankrupt and his wife, defendant Anna K. Von der Ahe, to Max Kaiser, and from Max Kaiser to defendant Anna K. Von der Ahe, were never delivered by bankrupt and defendants Anna K. Von der Ahe and Max Kaiser, and further alleges that both of said conveyances were at all times null and void; admits the execution and delivery of deeds from bankrupt Von der Ahe and his wife, defendant Anna K.

Von der Ahe, to John S. King and from John S. King to defendant Anna K. Von der Ahe, but denies that these deeds were fraudulent; admits that the real estate was sold on the 10th day of December, 1903, by the trustee under the deed of trust executed by bankrupt and Emma Von der Ahe, his first wife, to Christiana Winkelmeyer, but denies that the sale and purchase under deed of trust was fraudulent; admits the conveyance of said real estate from Christiana Winkelmeyer to Helen Caldwell, but denies said conveyance was fraudulent; admits that on the 14th day of December, 1903, defendant Helen Caldwell executed the three first deeds of trust to August Gehner, trustee, to secure the payment of her promissory notes to John A. Tomhagen, aggregating \$10,500, and the second deed of trust to secure the payment of her promissory note for \$2025, to same party, and that the notes secured by said second deed of trust have been paid, and avers that the same were paid by defendant Anna K. Von der Ahe.

“Denies that the conveyance from defendant Helen Caldwell How to defendant Kaiser Investment Company was for a pretended consideration and fraud of creditors of bankrupt Chris Von der Ahe; that in fact the conveyance executed by Helen Caldwell How to defendant Kaiser Investment Company was null and void because Kaiser Investment Company did not exist and was not a body corporate and was incapable of holding and owning the title to said real estate at the time of the conveyance from Helen Caldwell How to defendant Kaiser Investment Company. That the title to said real estate is in fact in defendant Helen Caldwell How, who holds same in trust for defendant Anna K. Von der Ahe, and that defendant Anna K. Von der Ahe has received the rents and profits of all of real estate for her sole use and benefit and paid out certain amounts for interest, taxes and upon the promissory notes secured by the second deed of trust executed by

Helen Caldwell How. That all of real estate was at all times prior to conveyances and at the time of the conveyances the homestead of bankrupt.

“The answer of defendant Kaiser Investment Company to plaintiff’s amended petition was a general denial, with admission regarding ownership of real estate by bankrupt at and prior to 1898, the execution of deed of trust by bankrupt and his former wife on December 8, 1894, also deeds from bankrupt and his wife, the defendant Anna K. Von der Ahe, to defendant Max Kaiser, and the deed from Max Kaiser to Anna K. Von der Ahe, and charges that said last two conveyances were null and void. Admits the execution of conveyances from bankrupt and his wife, defendant Anna K. Von der Ahe, to John S. King, and from John S. King to defendant Anna K. Von der Ahe, and asserts they were bona-fide conveyances and for a valuable consideration; admits the sale of real estate under deed of trust executed by bankrupt and his former wife, Emma Von der Ahe, to Christiana Winkelmeyer, and the conveyance from said Christiana Winkelmeyer to defendant Helen Caldwell How, and the execution of the four deeds of trust upon said real estate by defendant Helen Caldwell How to August Gehner, trustee, to secure the promissory notes of John A. Tomhagen, and charges all were bona-fide conveyances and for a valuable consideration, and further charges that the promissory notes, aggregating \$2025, secured by the second deed of trust on said real estate, have been fully paid and discharged by defendant Kaiser Investment Company. Admits that defendant Helen Caldwell How, on the 15th day of December, 1903, conveyed by warranty deed all of the real estate in question to defendant Kaiser Investment Company, subject to the four deeds of trust placed thereon by said defendant, and charges that ever since that date defendant Kaiser Investment Company has held and now holds the title to said real estate in good faith and for its sole use

and benefit, and ever since the 15th day of December, 1903, has received the rents and profits of said real estate in good faith and for its sole use and benefit, and that since acquiring title to said real estate it has paid out and expended certain moneys in payment of taxes, interest and upon the said second deed of trust; also states that at the time of conveyances by bankrupt the real estate was the homestead of said bankrupt.

"The answer of defendant Max Kaiser to plaintiff's amended petition was a general denial, and the adoption of the separate answer of the defendant Kaiser Investment Co.

"The answer of defendant Helen Caldwell How to plaintiff's amended petition was a general denial and the adoption of the answer of defendant Anna K. Von der Ahe."

The trial before the chancellor, Hon. Moses N. Sale, resulted in a finding of the facts and a decree in favor of the defendants from which the plaintiff in due time and in proper form appealed the cause to this court.

APPELLANT'S EVIDENCE.

In brief the evidence of the appellant tended to prove the following facts:

That about the year 1875 Chris Von der Ahe acquired the real estate in question, and erected the buildings thereon some time prior to the year 1894; that on the 8th day of December, 1894, Chris Von der Ahe and his then wife, Emma, placed a deed of trust on said real estate to secure \$11,000, money borrowed from one Winkelmeyer.

That between the years 1894 and 1902, Chris Von der Ahe contracted the debts previously mentioned, aggregating twenty odd thousand dollars.

That on or about August 17, 1899, Henry C. Becker instituted a suit in the circuit court of the city of St.

Louis against Chris Von der Ahe and his wife, Anna K., upon promissory notes aggregating approximately \$15,000. That shortly after the institution of this suit Chris Von der Ahe and his wife Anna K., by a general warranty deed dated January 29, 1900, conveyed the property in question to Max Kaiser, a brother of said Anna K., and that on the same date said Max by a general warranty deed conveyed the same land to his sister, Anna K. Von der Ahe. Both deeds were duly recorded May 22, 1902. That both of said deeds were without consideration. (This, however, seems to me to be immaterial, because all parties concede that both were void because never delivered.)

That Chris Von der Ahe and Anna K., his wife, on September 3, 1902, by deed duly executed conveyed said real estate to John S. King, and that on the same day said King by deed duly executed conveyed the same land to Anna K. Von der Ahe, both of which were duly recorded. King testified that in so far as he knew no consideration for the deeds passed between the parties at the time of their execution.

That Winkelmeyer, the owner of the deed of trust dated December 8, 1894, executed by Chris Von der Ahe, and his wife, Emma, on said real estate, to secure a loan of \$11,000, in the month of December, 1903, demanded payment of the same. That up to that time Chris Von der Ahe collected the rents on said property, and from December 14, 1903, the rents were paid to the defendant, the Kaiser Investment Company. That at the time of the sale of the property under the Winkelmeyer deed of trust, Emma Von der Ahe, the first wife of Chris Von der Ahe, had an outstanding dower interest in said property (she having been divorced from Chris Von der Ahe on March 26, 1895) and that there were several judgment loans existing against the property.

That at the sale of the property under the Winkelmeyer deed of trust, Helen Caldwell became the pur-

chaser, for the sum of \$11,500. That Helen Caldwell borrowed the money with which she purchased the property, and executed three or more deeds of trust on the same to secure the parties from whom she borrowed the money to pay Winkelmeyer. These deeds also included a small sum borrowed by her to pay cost and expenses of the foreclosure and sale of the Winkelmeyer deed of trust. All of these deeds were duly recorded on December 17, 1903, there being only one minute of time elapsing between the recording of each.

That on January 4, 1904, said Caldwell by a general warranty deed conveyed the said real estate, subject to the said deeds of trust, to the defendant, Kaiser Investment Company.

That the arrangements made for the sale of the property under Winkelmeyer deed of trust and the ultimate transfer of the same to the Kaiser Investment Company were done on behalf of Chris Von der Ahe.

That the bankrupt contracted the original debt with the Anheuser-Busch Brewing Association on August 4, 1896, while he was a single and unmarried man and not within the class of persons entitled to claim or hold a homestead, and the evidence further tended to show that at the time of contracting this debt, also the debt of Broadhead et al., and at the time the Pendleton judgment was rendered against him, the bankrupt did not reside upon or occupy any of the property in question as a homestead, or that he occupied none of this property as a homestead, until the spring of 1899.

RESPONDENT'S EVIDENCE.

The following facts are either admitted or practically not disputed.

It is admitted that Chris Von der Ahe duly acquired the title to the real estate described in appellant's amended petition from the owners thereof on the 20th day of December, 1875, and that Chris Von der

Ahe and Anna K. Von der Ahe were living upon said property at the time this case was tried in the circuit court. That Chris Von der Ahe and Anna K. Von der Ahe continued to live in one of the houses on said real estate up to the death of said Chris Von der Ahe, which occurred on the 5th day of June, 1913, and that said Anna K. Von der Ahe now occupies and lives in said house.

That Chris Von der Ahe and Emma Von der Ahe, his first wife, were legally married in 1870. That on the 8th day of December, 1894, Chris Von der Ahe and his then wife, Emma Von der Ahe, executed and delivered their promissory note for \$11,000 secured by their deed of trust on said real estate. Appellant admits in his amended petition, upon which this case was tried, that said deed of trust securing said note for \$11,000, executed by Chris Von der Ahe and Emma Von der Ahe, is and was at all times a legal and valid lien upon said real estate.

That Chris Von der Ahe and Anne K. Von der Ahe were legally married on August 18, 1898. That Max Kaiser and said Anna K. Von der Ahe were brother and sister.

The evidence tended to prove that prior to September 3, 1902, Chris Von der Ahe was legally indebted to Anna K. Von der Ahe in the sum of about \$5000.

That in the year 1896, said Anna K. Von der Ahe, who was then Anna Kaiser, instituted suit for breach of promise against said Chris Von der Ahe in the circuit court of the city of St. Louis, Missouri, and that said case was settled out of court by Chris Von der Ahe agreeing to pay her \$3000, but that only \$800 of said \$3000 was paid to her in cash, \$200 to her and \$600 to her attorney.

Chris Von der Ahe afterwards gave Anna K. Von der Ahe some old Sportsman's Park notes for the \$2200 balance. None of these notes, nor any part

thereof, were ever paid, and Anna K. Von der Ahe returned all of said notes to Chris Von der Ahe. The \$2200 was afterwards paid by said Chris Von der Ahe in the manner hereinafter set forth in this statement after numerous demands made by her upon him.

That Anna K. Von der Ahe had at different times loaned Chris Von der Ahe about \$2000, in the manner to be presently stated. Anna K. Von der Ahe, among other things, testified that:

"Q. Well, what did the balance of the five thousand dollar debt from Chris Von der Ahe to you consist of? A. The other amount was a judgment I had against Mr. Von der Ahe for a breach of promise that Mr. William F. Woerner attended to. He was my attorney.

"Q. Do you remember what year you sued Mr. Von der Ahe for breach of promise? A. In 1896.

"Q. You say that was settled for three thousand dollars? A. Yes, sir.

"Q. Did he ever pay you any part of that? A. He never did.

"Q. That made up the whole five thousand dollars that he owed you? A. Yes, sir.

"Q. When you married him was there anything said to you at that time by Chris Von der Ahe about satisfaction of this judgment or claim that you had against him for this breach of promise suit? A. No, sir.

"Q. Isn't it a fact that when he consented to marry you that you agreed to relieve him from any liability on the claim for the breach of promise? A. No, sir.

"Q. You mean to tell the court that you retained your judgment against him for breach of promise when he consented to marry you? A. Yes, sir.

"Q. Now in reference to this breach of promise suit, did you come into this court and have a trial of the case? A. No, sir, Mr. Woerner settled it.

"Q. I thought you said you got a judgment? A. That is what Mr. Woerner told me. Mr. Woerner settled it for me. I don't know how those things are done.

"Q. Now, isn't it a fact that he settled it by Chris agreeing to marry you? A. No, sir. Mr. Von der Ahe was married at the time, and I sued him for breach of promise when he was married. . . .

"The Court (Q.): What did you get as a settlement? A. Three thousand dollars.

"The Court (Q.): In money? A. No, sir.

"The Court (Q.): In what? A. Well, he was supposed—he paid me \$200 and he was supposed to pay the rest in six months.

"The Court (Q.): Did he pay you the \$200? A. Yes, sir.

"The Court (Q.): Did he pay you any of the balance? A. No, sir, he kept me off from time to time, and when I asked him for it after while he said he would give me that property for the money he owed me.

"Mr. O'Keefe: Did you take any notes or memorandum of what he owed you on the settlement? A. I held some notes, but I turned them over to him again.

"Q. When did you turn them over to him? A. In about 1900.

"Q. In about 1900? A. I think so. Those were notes secured by him, and he said if he would get the money he would pay me, but the notes were never paid, and I just turned them over to him, and he deeded that property over to me.

"Q. That was shortly after you were married that you surrendered those notes to him? A. No, sir. We were married quite a while before I surrendered them to him.

"Q. You just took a notion one day to surrender these notes without any reason for it? A. No.

"Q. What was the occasion? A. He asked me for those notes.

"Q. And you just willingly turned them over to him? A. He told me he would pay me some other way.

"Mr. Kelley (Q.): Now, Mrs. Von der Ahe, those notes that Chris gave you to hold until this three thousand dollar settlement of the breach of promise suit were paid, were never paid, were they? A. No, sir.

"Q. You gave them back to him? A. I did.

"Q. What did he owe you that five thousand for? A. Well, \$1000 I sent him to Pittsburgh—

"Q. When did you loan Chris Von der Ahe this one thousand dollars? A. I gave him that on the 14th or 15th of February, 1898, when he was in Pittsburgh.

"Q. That was the time he got in jail at Pittsburgh? A. Yes, sir; and he sent Mr. Muckenfuss over to the house and asked if I could not send down any money, that he was hard up, and if I could get any I should send it to him, and I sent him one thousand dollars.

"Q. Where did you get that thousand dollars? A. Seven hundred and fifty dollars was my own money and two hundred and fifty I borrowed from my brother Max.

"Q. Is that the seven hundred and fifty that you had in the Northwestern Savings Bank? A. Yes, sir.

"Q. Mrs. Von der Ahe, what money did you have when you married Chris Von der Ahe? A. I had about a thousand dollars, what I had sent him on to Pittsburgh.

"Q. What? A. About a thousand dollars.

"Q. You didn't have that then when you were married? A. No, sir; but I had given it to Mr. Von der Ahe.

"Q. You made him a present of it? A. No, sir; I didn't do that.

"Q. Well, you said you gave it to him? A. I sent it to him, I said.

"Q. You were no relation of Mr. Von der Ahe's were you? A. No, sir.

"Q. You were not at that time? A. No, sir.

"Q. Was he married at that time? A. No, sir.

"Q. What? A. No, sir.

"Q. You mean to tell us that he was not married in February, 1900—1898? A. No, sir.

"The Court (Q.): That is, you were not married to him. Was anybody else married to him? A. No, sir.

"The Court (Q.): Was he a single man at that time? A. Yes, sir; as much as I know.

"Mr. O'Keefe: You were not married to him at that time? A. No, sir.

"Q. And you were not married to him until August of that year? A. No, sir.

"Q. Do you recall about the time you made him the loan? A. February 14th or 15th I gave it to Mr. Muckenfuss and he sent it to Pittsburgh.

"Q. Now, what else did this debt consist of? You have told of one thousand dollars. A. Another thousand is what I borrowed from my mother from time to time, and gave it to Chris. That went up to another thousand.

"Q. When did you loan him the last of this second thousand dollars? A. I guess it was about in 1901.

"The Court (Q.): When did you get that thousand from your mother? A. At certain times up to 1901. This was before he transferred this property to me, but do not remember just how long before.

"Q. Didn't you and Chris Von der Ahe sign a deed to Max Kaiser to that property? A. We signed a deed, but it was never delivered.

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"I do not know what became of that deed. Max signed a deed conveying the same property to me, but it was not delivered either.

"Q. Who got those deeds after they were signed, if you know? A. I don't know.

"Q. Do you know whether Chris did or not? A. We never got those deeds.

"Q. How is that? A. We never got those deeds.

"Q. Who do you mean by we? A. Max and I.

"Q. But what I want to get at is, did you deliver the deed that you and Chris signed to Max? A. We didn't—I did not.

"Q. When did you next see the deed that you and Chris signed, conveying the six stone-front houses to Max Kaiser, and the deed that Max Kaiser signed conveying these houses to you? A. When I seen them again?

"Q. Yes. A. When I took them out of the safe.

"Q. Out of whose safe? A. Out of Mr. Von der Ahe's safe.

"Q. When you took them out of the safe where was he? A. He was out of the city.

"Q. Did he tell you to go and get them? A. No, sir.

"Q. How did you happen to go and get these deeds? A. I had trouble with Mrs. Von der Ahe, and I understood it was my property, and I went and took those deeds and took them down town to Mr. Woerner, and Mr. Woerner said they were not recorded, and I should record them.

"Q. What Mr. Woerner? A. Mr. William F. Woerner, an attorney here.

"Q. What did you do with them? A. Mr. Woerner recorded them for me.

"Q. What were those deeds made for? A. To pay me my money that he owed me.

"Q. Who owed you? A. Mr. Von der Ahe.

"Q. How much did he owe you in 1900, at the time you and Chris Von der Ahe made the deed to Max Kaiser, and Max Kaiser made a deed to you? A. He owed me \$5000.

"Q. Now, did Mr. Von der Ahe ever institute any court proceedings to set those deeds aside? A. He did.

"Q. How long afterwards? A. As soon as he came back.

"Q. As soon as he came back? A. Yes, sir.

"Q. Do you remember the time that you and Chris Von der Ahe signed a deed conveying the property described in the plaintiff's amended petition to John S. King? A. Yes, sir.

"Q. And John S. King signed the deed conveying certain property back to you, and certain property to Chris Von der Ahe? A. Yes, sir.

"Q. Now, will you just tell about that transaction—all about it in your own way? A. Yes, sir; Mr. Von der Ahe and I made a deed to Mr. King for all the property.

"Q. Tell the court what property it included? A. It included the northeast corner leasehold and northwest corner property, and the six stone-front houses, and Mr. King made a deed back to Mr. Von der Ahe for the northeast corner leasehold and northwest corner property, and he executed another deed for the six houses to me.

"Q. Were those deeds ever delivered? A. Yes, sir; they were delivered for the money that he owed me. For that reason they were made.

"Q. How much did he owe you at that time? A. Five thousand dollars.

"Q. Did he ever pay you any part of it? A. Never a cent.

"Q. Now, why did you and Chris Von der Ahe execute the deed to John S. King, and John S. King execute the deed to you? A. That was for that mat-

ter—Chris owed me that money, and to pay me for that reason it was done.

“Q. Any other reason that this property was transferred to you? A. No, sir; just what he owed me and for that reason he transferred that property over to me.

“Q. That was when? A. That was the 3d day of September, 1902.

“Q. Mrs. Von der Ahe, did you have any other purpose in taking title to this property in question than in payment of your debt—any other purpose whatsoever? A. No, sir.

“Q. State the purpose for which you took the title to this property September 3, 1902?

“Mr. O’Keefe: She has stated that.

“The Witness: I took it for the money Chris owed me.

“Q. Now, at the time this property was sold, tell the court in your own way what you did? A. You mean when it was sold under the deed of trust?

“Q. Yes. A. I went to Mr. Franciscus and told him, as this was my property I wanted him to buy it in for me, and I would like him to form a corporation, as I had had trouble with Mr. Von der Ahe before, and didn’t know but what I would get into some more, and my father went down town and seen some one when that property was to be sold, and he got the advice that if I got up a corporation I would not have to have my husband’s signature if I wanted to sell at any time, and I went to Mr. Franciscus’ office and told him I wanted him to buy the property in for me, as it was my property, and I wanted to form a corporation.

“Q. Did you—what did you direct him to do? A. I directed him to form this corporation.

“Q. What did you direct him to do in regard to getting the title to the property before the corporation

was formed? A. I directed him to make a deed of trust.

“Q. Well, did you take the title to the property in your name from Mrs. Winkelmeyer? A. No, sir; it was taken in Helen Caldwell’s name.

“Q. Well, how did it happen to be done? Who told them to do it? A. I told them to do it.

“Q. Why did you tell them to take it in Helen Caldwell’s name instead of taking it in your own? A. Then I would be in just the same place again, and I would need his signature to everything, and that is what I didn’t want. That is why I wanted to form the corporation, so I would not need his signature to sign any papers, or anything, if I wanted to sell, or get a loan of money on it, or anything like that.

“Q. Now, who did Helen Caldwell take the title to this property for, if you know? A. She held it in trust for me.

“Q. Where did you get the money to pay Mrs. Winkelmeyer the \$11,500 purchase price of this property? A. I had Miss Helen Caldwell execute deeds of trust for me, so I could get the money.

“Q. How much did you raise on these four deeds of trust? A. The original deed was \$11,500, and I added ten hundred and twenty-five to it, and made a second deed of trust.

“Q. How much were both deeds of trust, the first and second? A. Twelve thousand, five hundred and twenty-five dollars.

“Q. What became of this money? What was done with this money that Helen Caldwell borrowed on this property, described in plaintiff’s amended petition? A. That was paid over to Mrs. Winkelmeyer.

“Q. Who did that? A. I did.

“Q. Do you remember when the Kaiser Investment Company was incorporated? A. It was incorporated the 28th day of December, 1903.

"Q. Now, after Mr. Franciscus and Mr. Kunz and Mr. Quackenboss had incorporated this Kaiser Investment Company for you, what did they do with the stock? A. They kept it in trust for me.

"Q. Well, did you ever order them to transfer it? A. I did later on.

"Q. Well, who did you order them to transfer that stock to? A. To transfer it to Mr. Franciscus, one hundred shares over to me and one share to Max Kaiser.

"Q. Well, how did you happen to transfer that share to Max Kaiser? A. Just to hold him in the corporation, because Mr. Quackenboss wanted to step out.

"The Court (Q.): Who held the balance? A. Mr. Kunz. He held forty-seven shares.

"Mr. Kelley (Q.): Now, how did you happen to have some of this stock transferred to Chris Von der Ahe, forty-seven shares of it? A. Well, Mr. Von der Ahe came and asked me if I would not loan him any of that stock, as he wanted to borrow some money, and that is how I transferred those forty-seven shares over to Chris.

"Q. Do you know who he borrowed the money from? A. From my brother, Max Kaiser.

"Q. Do you know how much it was? A. Well, he owed him that before that, and at that time he loaned him, I think, three hundred and fifty.

"Q. Chris Von der Ahe didn't pay you any money for that stock, did he—that forty-seven shares of stock? A. No, sir; I loaned it to him.

"Q. To secure the loan of Max? A. Yes, sir.

"Q. Now, this one share of stock that you had transferred to Chris Von der Ahe, what did you do that for? A. Just to hold him in the corporation, as it needed three.

"Q. How much stock had been transferred to you? A. One hundred shares of stock.

"Q. That was Mr. Franciscus'? A. Yes, sir.

"Q. And that left Mr. Quackenboss and Mr. Kunz still? A. Yes, sir.

"Q. And who transferred the forty-seven shares to Chris Von der Ahe? A. I told Mr. Kunz to transfer it to Mr. Von der Ahe.

"Q. And he did? A. Yes, sir.

"Q. What became of Mr. Kunz's other two shares of stock? A. I think Max got them.

"Q. How did he happen to get them? A. Well, I owed him one hundred dollars, and I asked him if he would not take those two shares of stock in payment of it, and he said he would.

"Q. How did they happen to be transferred over to him? A. It was done at my direction.

"Q. Now, Mrs. Von der Ahe, how much have you paid out in taxes on this property since September 3, 1902? A. I have paid out for city and school taxes five thousand one hundred and nine dollars and some cents.

"Q. Do you know how much those taxes run a year? A. They run from about three hundred—

"The Court (interrupting): What is the purpose of this?

"Mr. Kelley: I want to show she has been paying off debts on this property, taxes, and so forth.

"The Court: She has been getting the income, too, hasn't she?

"Mr. Kelley: Yes, sir.

"The Court: I don't think that cuts any figure in the case. She was getting the income from the property and she paid the taxes. I don't expect in this action if a decree goes against her to hold her for any income, and, of course, I cannot take into consideration the fact that she paid the taxes.

"Mr. Kelley (Q.): State whether or not you have held this property, the title to this property, for Chris

Von der Ahe, since it was conveyed to you? A. No, sir; it was my property.

"Q. Has he gotten the rents and profits and income from it? A. No, sir.

"The Court (Q.): Who has been collecting the rents? A. I did.

"The Court (Q.): You collected them yourself? A. Yes, sir.

"The Court (Q.): Since when? How long have you been collecting them? A. The last four years."

William F. Woerner testified substantially as follows:

"Q. Do you know Mrs. Anna K. Von der Ahe? A. I do.

"Q. Did you represent her in the breach of promise suit against Chris Von der Ahe? A. I did.

"Q. About what year did you file that suit? A. I think it must have been about the latter part, or some time in 1896.

"Q. About 1896? A. Yes, sir.

"Q. And what was the termination of that suit? A. That suit was disposed of by a settlement between the parties.

"Q. It never went to trial? A. It was never tried.

"Q. It was settled out of court? A. Yes, sir.

"Q. Do you remember the amount of the settlement? A. I do. Three thousand dollars.

"Q. Do you remember whether or not Mrs. Von der Ahe took any note or any evidence of that indebtedness from Mr. Von der Ahe? A. The witness: To the best of my recollection I advised Mrs. Von der Ahe to take nothing but cash, but there seemed to have been a great deal of difficulty of getting cash, and my recollection is that it was partly paid in cash and partly in notes.

"Mr. Kelley: Q. Do you remember how much cash? A. Notes that were supposed to be good at that time.

"Q. Do you remember how much cash? A. Well, I know that there was six hundred dollars paid in cash, and I think something in addition to that—several hundred dollars more than that.

"Q. In cash? A. Yes, sir; I believe two hundred dollars. I think the entire payment in cash was eight hundred dollars.

"Q. One of the terms of that settlement was he had to pay your fee? A. Yes, sir.

"Q. And that was six hundred dollars? A. Yes, sir; I insisted upon Mr. Von der Ahe paying that in cash.

"Q. That was six hundred dollars? A. Yes, sir.

"Q. And two hundred additional that you speak of was to her? A. Yes, sir; I insisted that she should get at least some cash.

"Q. Do you know whether or not she ever got any Sportman's Park notes? A. Well, now, I cannot testify to that, because I don't recollect whose notes they were, but they were stated to me to be perfectly good. Mr. Von der Ahe assured me time and again they were good.

"Q. You don't know whether the notes were ever paid? A. I do not."

"CROSS-EXAMINATION.

"Q. When was that settlement made? A. That settlement was made in August, 1897. The money was paid then.

"Q. 1897? A. Yes, sir.

"Q. These notes were delivered to Mrs. Von der Ahe at that time? A. I do not know. I think they were.

"Q. Did you handle the transaction about the closing of the deal? A. I arranged the terms and the parties both stated that the matter had been settled and the suit dismissed.

"Q. You never did see the notes? A. Now, I am not prepared to testify to that. I cannot recall whether I actually saw the notes or not, but I know there was a bona-fide consideration of three thousand dollars, or that suit would not have been dismissed.

"Q. You didn't know at the time the settlement was made whether or not there was an agreement on Mr. Von der Ahe's part to marry the then Miss Anna Kaiser? A. Well, he was married at that time, and that is why the breach of promise was brought.

"Q. He was married at that time? A. Yes, sir.

"Q. You would not undertake to say but what those notes were surrendered in settlement of the debt by Mr. Von der Ahe marrying Miss Anna Kaiser? A. I do undertake to say that that consideration passed for the settlement of the breach of promise case, for the damages that were claimed in that petition."

Joseph F. Obernier testified:

"Q. What is your business? A. Cashier of the Northwestern Bank.

"Q. Was it the Northwestern Savings Bank in the year 1897? A. Yes, sir.

"Q. I now hand you some papers. Will you tell the court what they are? A. They are certificates of deposit in the name of Anna Kaiser.

"Q. Anna Kaiser is now Mrs. Anna Von der Ahe? A. Yes, sir.

"Q. What are the amounts of those certificates of deposits? A. The full amount is seven hundred and fifty dollars.

"Q. Were they issued by your bank? A. Yes, sir.

"Q. For money she put in there? A. Yes, sir."

There was also one for \$250. All of them were introduced in evidence.

"Mr. Kelley: Q. The money called for in all these certificates of deposit was deposited by Anna Kaiser, who is now Anna Von der Ahe? A. Yes, sir.

"Q. Do you know when she drew this money out? A. Yes, sir: February 14, 1898.

"Q. February 14, 1898? A. Yes, sir.

"Q. I now hand you two papers and ask you what they are? A. They are certificates of deposit issued by the Northwestern Savings Bank payable to Max Kaiser, one for one hundred and the other for one hundred and fifty dollars.

"Q. Bearing what date? A. The one-hundred-dollar one bears the date July 21, 1897, and the one for one hundred and fifty dollars, September 13, 1897.

"Mr. Kelley: I offer them in evidence, your Honor, and ask that they be marked as exhibits.

"The Court (Q.): That money was drawn out of your bank, was it? A. Yes, sir.

"The Court (Q.): On all the certificates? A. Yes, sir.

"Mr. Kelley: When did Max Kaiser draw out that \$250? A. The same day, February 14, 1898."

Max Kaiser among other things said:

"Mr. Kelley: Q. Now, Mr. Kaiser, do you remember the time that Chris Von der Ahe was in jail in Pittsburgh? A. Yes, sir.

"Q. What year was that? A. I think—1897.

"Q. 1897? A. Yes, sir.

"Q. Do you know whether or not of your own knowledge your sister sent him any money at that time? A. I do, sir.

"Q. How much? A. It was \$1000."

The testimony of numerous witnesses shows that the property in question was worth at the time it was conveyed to Anna K. Von der Ahe, about \$15,500; some

testified it was worth about \$17,000, others \$16,000 and some others \$14,000 or \$15,000.

The evidence also tended to show that at that time Chris Von der Ahe had a homestead right in said property of the value of \$3000.

On the date of the institution of the bankruptcy proceedings against Chris Von der Ahe, his indebtedness aggregated some \$21,000, some of which had been reduced to judgments. Of that \$21,000 of indebtedness, only about \$12,000 of it was proven up against him before the referee in bankruptcy.

Upon cross-examination of Charles C. Kunz, a witness introduced by appellant, he testified as follows:

"Q. Now, before the sale under the deed of trust, Mrs. Anna K. Von der Ahe owned these six stone-front houses, didn't she?

"Mr. O'Keefe: Well, the deeds are the best evidence of that.

"Mr. Kelley: I want to prove a conversation now he had with her.

"Q. Do you remember that? A. I think so, but I would have to refer to the deed myself.

"Q. Do you remember about the time this sale was to take place and Mrs. Von der Ahe came to you and had a conversation with you about this property? A. Yes, sir.

"Q. What did she say, Mr. Kunz? A. My recollection is that she wanted us to buy the property and have us make a loan for her. That is what she asked at the time.

"Q. And she told you at that time it was her property and she wanted to protect it? A. Yes, sir.

"Q. Didn't she tell you she had had trouble with Chris and she didn't want to take the title in her name, or something to that effect? A. I think she did.

"Q. And then did she direct you to get the title for her to this property? A. You mean to purchase it?

"Q. Yes, sir; from Mrs. Winkelmeyer? A. I think so, yes.

"Q. And you did that as her agent? A. Yes, sir.

"Q. How did you happen to put the title to this property in the name of Helen Caldwell? A. We had it put in her name temporarily until the company was organized.

"Q. Who was that for? A. It was for Mrs. Von der Ahe at that time.

"Q. Now, then, Helen Caldwell never paid a dollar for that property? A. No, sir.

"Q. And how did Helen Caldwell happen to execute these notes and deeds of trust to August Gehner for \$12,525? A. By request of our office.

"Q. For Mrs. Von der Ahe? A. Yes, sir.

"Q. But you were acting as agent for Mrs. Von der Ahe? Is that right? A. Yes, sir.

"Mr. Kelley: Q. Now, all the interest then that Helen Caldwell had in this property was to hold it for Mrs. Von der Ahe until this corporation was organized? A. Yes, sir.

"Q. Did Mrs. Von der Ahe tell you to organize the Kaiser Investment Company? A. Yes, she did.

"Q. She instructed you to do that, did she? A. Yes, sir.

"Q. And did she give you her reason for that, wanting that company organized? A. Yes, I think I mentioned that before, that she could not hold the title to it, being a married woman.

"Q. And had had trouble with Mr. Von der Ahe—did she mention that? A. Yes, sir.

"Q. And in case she wanted to convey it or mortgage it, she wanted it so she could do that? A. Yes, sir.

"Q. Do you remember that? A. Yes, sir.

“Mr. Kelley: Q. Then you were acting as agent for Mrs. Von der Ahe in getting this loan from Gehner? A. Yes, sir.

“Q. And in having this transfer made from Christina Winkelmeyer, is that right? A. Yes, sir.

“Q. Did you pay out the money realized from these loans. For whom did you pay out the money realized from these loans, from Mr. Gehner? A. For whom?

“Q. For whom, yes. A. Why, it was paid out for Mrs. Von der Ahe, but the Kaiser Investment Company was the way the account was on the books.

“Mr. Kelley: Q. Now, Mr. Kunz, will you look at that paper and tell me what it is (indicating paper)? A. It is articles of corporation.

“Q. For what? A. Kaiser Investment Company.

“Q. Will you tell me the date on that—when that was issued by the Secretary of State of Missouri? A. The 28th day of December, 1903.

“Q. Yes, sir. Now, will you look at the paper I now hand you (handing witness paper)? A. That is a general warranty deed from Helen Caldwell to the Kaiser Investment Company.

“Q. What date does that deed bear? A. The 15th of December, 1903.

“Q. When was that deed acknowledged? A. The 15th day of December, 1903.

“Q. The same day it was recorded? A. Yes, sir.

“Mr. Kelley: Q. The deed from Helen Caldwell to the Kaiser Investment Company then was made fifteen days before the Kaiser Investment Company was incorporated, wasn't it? A. About thirteen days.

“Q. About thirteen days? A. Yes, sir.

“Q. Now, when Helen Caldwell executed that deed, what did she do with it? A. Why, I don't recall.

"Q. Gave it back to you didn't she? A. I could not say that.

"The Court: Very likely. We will admit that she did. It doesn't make any difference.

"Mr. Kelley: Q. Now, all the interest then that Helen Caldwell had in this property was to hold it until this corporation was organized? A. Yes, sir.

"Q. Did Mrs. Von der Ahe tell you to organize the Kaiser Investment Company? A. Yes, she did.

"Q. She instructed you to do that, did she? A. Yes, sir.

"Q. And had had trouble with Mr. Von der Ahe—did she mention that? A. Yes, sir.

"Q. And in case she wanted to convey it or mortgage it, she wanted it so she could do that? A. Yes, sir.

"Q. Do you remember that? A. Yes, sir."

I. There is no question but what Chris Von der Ahe, the husband of Anna K. Von der Ahe, was hopelessly insolvent at the time he transferred the property to the respondent, his wife; and it cannot be successfully contended that the evidence for the appellant did not tend strongly to prove that said transfer was made to defraud his creditors of their just dues. In other words, I feel satisfied from reading this voluminous record, about three hundred printed pages, that appellant made out a strong case in behalf of the creditors, and had there been no evidence to the contrary, doubtless the learned chancellor should, doubtless would, have found for the appellant and decreed the deeds mentioned to be null and void. But when we view the entire case, both sides, as illuminated by all the evidence introduced, that for the appellant, as well as that for the respondents, quite a different color and character are given to the facts sought to have been established by appellant.

**Fraudulent
Conveyance:
Preferring
Wife.**

What are the facts of the case as learned chancellor found them to be? Answer: When Chris Von der Ahe married the respondent Anna K. Kaiser, he owned the property in question, worth about \$15,500, possibly \$16,000, as well as other real estate, which was incumbered by a deed of trust executed in behalf of Mrs. Winkelmeyer to secure a loan of \$11,000 and interest. That when this deed of trust was foreclosed, or rather when the sale took place under it, \$12,525 was required to liquidate or pay that debt (all of which was assumed by the respondent, Anna K. Von der Ahe). That at the time of the transfer of said property in question to her he was indebted to her in the sum of at least \$4200, made up of the \$3000 recovered in the breach of promise suit, less the \$200 paid her, and \$600 paid to her attorney, the \$1000 she sent to him in Pittsburgh and the \$1000 she borrowed from her mother and turned over to him. If we add this \$4200 to the \$12,525 secured by the Caldwell deed of trust on the property and assumed by respondents, we would have the sum of \$16,525. That sum unquestionably is at least \$500 in excess of the actual value of the property when it was transferred to Anna K. Von der Ahe, to say nothing of the homestead rights of Chris Von der Ahe or the dower interest of Emma Von der Ahe, his former and divorced wife.

These observations are in harmony with the written memoranda of the chancellor's findings and decree filed in the case, and embodied in the record.

If this is true, which we must accept as such, since the chancellor so found from the preponderant evidence, then the findings and decree of the circuit court must not be disturbed without they contravene some law of the State or sound principle of equity. [Huffman v. Huffman, 217 Mo. 182.]

II. Counsel for appellant has assigned many legal objections to the findings of the court, but after a

Fraudulent careful consideration of each and all of
Conveyance: them, I am convinced that there is but one
Breach of of them that requires special considera-
Promise Notes. tion at the hands of this court, and it is
 couched in the following language:

“(a) Promissory notes received by defendant Anna K. Von der Ahe in settlement of breach of promise case were not the bankrupt’s obligations.

“(b) Marriage of defendant to bankrupt subsequent to execution and delivery of these notes destroyed their validity.

“(c) Delivery of notes by defendant Anna K. Von der Ahe to bankrupt after her marriage to bankrupt raised the presumption of payment. [22 Am. & Eng. Ency. Law (2 Ed.), 589; Lawson v. Gudgel, 45 Mo. 480; Stephenson v. Richards, 45 Mo. App. 544; Nat. Tube Works Co. v. Machine Co., 118 Mo. 365, l. c. 376; Klauber v. Schloss, 198 Mo. l. c. 513.]”

This objection seems to be composed of three elements, which I have designated by the letters *a*, *b*, and *c*, and for convenience I will consider them in the order stated.

(a) Attending the first: I am not clear that I comprehend the meaning of counsel as stated in clause (a) of this objection.

It is conceded that the promissory notes received by the respondent Anna K. Von der Ahe, (*nee*) Anna K. Kaiser, were not the personal obligations of Chris Von der Ahe, but were notes or obligations issued by the Sportman’s Park Association, which the evidence shows he owned and transferred to her in satisfaction of the amount he owed her on account of the settlement of the breach of promise suit mentioned. I am unable to see that there would have been any difference in the legal effect of the settlement, had Chris Von der Ahe given her his individual promissory note instead of those of the Sportsman’s Park Association. I can readily see how there might have been a difference

in the value of the notes issued by Chris and those issued by the Association; but that fact in no manner could have affected the character of the settlement, or have destroyed their validity.

In my opinion, there is no merit in this element of the objection.

(b) Regarding the second: Counsel have cited us to no authority supporting the contention that the mere fact of the marriage of Chris Von der Ahe to Anna K. Kaiser, subsequent to the sale and transfer to her of the notes of the Sportsman's Park Association in settlement of the breach of promise suit, nullified them or destroyed their validity. Nor has any suggestion or reason been assigned why that should be true; and after much thought and reflection I have been unable to see any solid foundation upon which to predicate such a contention. In my opinion it is wholly untenable.

(c) Respecting the last contention: It might be conceded (in the absence of the statute that declares all gifts, etc., of money and property by a wife to her husband not in writing shall be void) that the delivery of the notes by the wife to her husband raised a presumption of payment, yet the uncontradicted evidence shows that it was not the intention of the wife to give the notes to her husband, but clearly her intention was to lend them to him in order that he might use them as collateral security for money he desired to borrow.

The authorities cited in support of this proposition have no application to the facts of this case. Had Chris Von der Ahe been the maker of the notes, and had the wife delivered them back to him, in the absence of all evidence, then a presumption of payment would have arisen, but not so in a case like this, where a third party was the maker, and the delivery fully explained by the evidence.

There is no merit in the objection.

III. After a careful consideration of the record in this case, and a review of the authorities cited, I am satisfied that Chris Von der Ahe was legally and justly indebted to his wife, Anna K., in the sum of \$4200, and that he conveyed the property in controversy to her subject to the deeds of trust thereon, in satisfaction of that indebtedness, which was more than the property was worth, and so believing, in my opinion, the judgment of the circuit court should be affirmed.

**Fraudulent
Conveyance:
Full Value
of Property.**

It is so ordered. All concur.

CHARLES JABLONSKY v. BARNARD WUSSLER
et al., Appellants.

Division One, December 2, 1914.

IMPLIED EASEMENT: Obstruction: Injunction. For the reason stated in Bussmeyer v. Jablonsky, 241 Mo. 681, the judgment in this case in which plaintiff wishes to enforce an implied easement conferred upon one piece of property by the owner of the adjoining piece, and to enjoin the defendants from obstructing the entrance to a three-foot passageway upon a lot owned by defendants, is reversed, the facts and issues being the same.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow*, Judge.

REVERSED.

Muench, Walther & Muench for appellants.

August Walz, Jr., and W. G. Carpenter for respondent.

GRAVES, J.—Action in equity to enforce an implied easement. Such action takes the form of a pe-

tion by which it is sought to enjoin the defendants from obstructing the entrance to a three-foot passageway upon the western part of a lot owned by the defendants.

Both the facts and the law of this case were before this court in the case of Bussmeyer v. Jablonsky, 241 Mo. 681. The present plaintiff was the defendant in the Bussmeyer case. He urged upon us then the doctrine of there being required the element of necessity before there could be an easement by implication of law. He says in the record before us that the facts of the two cases are practically identical. The admission thus reads:

“Mr. Carpenter: If your Honor please, I may concede right now that so far as any easement is concerned by prescription, we don't claim any. We are after an easement upon a different theory from that, and I want to call your Honor's attention to this case here. This is a case in the Utah Supreme Court, the case of Rollo v. Nelson, 34 Utah, 116 (citing and reading from opinion; also from case from Pennsylvania Supreme Court, Liquidated Carbonic Co. v. Wallace; also case from Oregon Supreme Court, German S. & L. Co. v. Gordon). These are all reported in the 26 L. R. A., New Series. One is reported at page 315, another at page 327, and the other case at page 331. All of them were heavily annotated. Here is a line of cases identical with this case (reading extracts from cases). This is all on the theory that these easements are appurtenant to this use in connection with the property sold. At this point it may be proper to state to your Honor that this very passageway on the south side of this man's property, going into the Bussmeyer property, was litigated in the circuit court here in 1908 in the same way that this is now being litigated. There Mr. Jablonsky stopped up the passageway, and this same identical proceeding was brought against

him, and in the hearing of that case before Judge RULE, the right to the easement was upheld. That case is now on appeal in the Supreme Court in this State. It raises the same identical question and practically the same identical facts here involved. And we hope to reach that in the Supreme Court next year. This is not a prescription easement we are seeking here. This is an easement where it was made specifically to the property by the owner himself and where it was conferred upon one piece of property in favor of an adjoining piece of property by the owner, an appurtenant to it, and enhances the value of that property. I want to offer that evidence, your Honor, and merely save an exception to the overruling of the objection."

A picture in the record will explain the situation. We have "exhibit 2" which shows both the passageway in dispute in the case at bar and the one in the Bussmeyer case. Here is the exhibit:



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EXHIBIT 2.

The passageway in dispute we have marked with the letter "A." Then there is another passageway marked "B," and still a third one which we have marked "C." The one marked "C" is the one in dispute in the Bussmeyer case, *supra*. Back of all this property is the alley way fully described in the Bussmeyer case.

When this short statement and this picture are examined in connection with the full statement of facts in the Bussmeyer case, there will be a full statement of the case at bar. From it all it appears that the law stated in the Bussmeyer case controls this case. Under the views there expressed, this judgment should be reversed, and it is so ordered. All concur.

S. A. KELLER et al., Plaintiffs in Error, v. R. F.
SUMMERS.

Division One, December 2, 1914.

1. **APPELLATE JURISDICTION: Disagreement of Judges of Court of Appeals.** Upon a transfer of a cause from a Court of Appeals to the Supreme Court in the method prescribed by Sec. 6 of the Amendment of 1884, the latter court has complete and sole jurisdiction.
2. ———: ———: **Words Used By Judge: Use of Word Decision.** It is not necessary that the judge of a Court of Appeals who deems its decision in a certain cause to be in conflict with some prior decision of the Supreme Court or another Court of Appeals, to employ any stereotyped terms to express that idea. It is not even necessary that he use the word "decision." If he in clear terms says that "to reverse the judgment in this cause would be in conflict with" certain mentioned cases either of the Supreme Court or a Court of Appeals, that is sufficient.
3. ———: ———: **Opinion Means Decision.** Within the meaning of Sec. 6 of the Constitutional Amendment of 1884, declaring that "when any one of said Courts of Appeals shall in any cause or proceeding render a decision which any one of the judges therein sitting shall deem contrary to any previous

Keller v. Summers.

decision of any one of said Courts of Appeals, or of the Supreme Court," the cause shall be transferred to the Supreme Court, an opinion in which a majority of the judges of a Court of Appeals concur, is a "decision." It was the principles of law announced and adjudications made that concerned the framers of the amendment, and they are found in opinions.

4. ———: ———: **Whole Case.** When a cause is certified to the Supreme Court by a judge of a Court of Appeals on the ground that he deems its decision to be in conflict with some previous decision, etc., the whole case is for review, just as if it had never been considered by said Court of Appeals.
5. **PUNITIVE DAMAGES: No Actual Damages.** Punitive damages may be recovered where a proper basis therefor is laid in the petition and proved, although the plaintiff recover only nominal actual damages.
6. ———: **Recovery on Grounds Not Pledged: Fraud: Larceny.** Where the petition charged that defendants obtained plaintiff's certificate of deposit for \$300 by fraud, conspiracy and procuring him to become drunk and a party to a gambling game, but did not impute to them the technical crime of larceny, an instruction, property hypothesizing the conditions upon which he can recover actual damages, is error if it authorizes the jury to return a verdict for punitive damages if they believe the defendants had stolen the certificate.
7. ———: ———: **Segregated Error.** But the error of a verdict for punitive damages authorized by an instruction on a ground not pleaded, does not affect that part of it for actual damages, and the finding for punitive damages being capable of segregation from the rest of the verdict, the judgment will be affirmed, notwithstanding said erroneous instruction, if plaintiff will file a *remittitur* of the punitive damages.

Error to Jasper Circuit Court.—*Hon. Haywood Scott,*
Judge.

AFFIRMED (*conditionally*).

M. R. Lively for plaintiffs in error.

H. W. Currey, George V. Farris and *W. J. Owen*
for defendant in error.

STATEMENT.

This suit was decided by the Springfield Court of Appeals by the affirmance of the judgment for plaintiff on the second count of his petition and the reversal and remanding of his judgment on the fourth count of his petition. One of the members of that court dissented to the reversal and remanding in a written opinion, setting forth the grounds of his dissent and stating that "to reverse that part of this judgment," etc., "is also in direct conflict with Cartwright v. Culver, 74 Mo. 179, . . . and also in direct conflict with Foster v. Railroad, 115 Mo. 165." Thereupon the majority opinion concludes, to-wit: "*Self*, Special Judge, concurs: *Cox, J.*, dissents as to that part of the opinion reversing and remanding the cause on the fourth count of the petition; and requests that the cause be certified to the Supreme Court, and it is so ordered. *Gray, J.*, not sitting." [Summers v. Keller, 152 Mo. App. 626, 646, 651.]

As shown in the two opinions of the judges of the Springfield Court of Appeals, this cause was lodged there after a writ of error had been sued out in the Kansas City Court of Appeals by the defendants in a judgment in favor of plaintiff in the circuit court of Jasper county, by the transference of the cause to the Springfield Court of Appeals. It is shown by the record and briefs in the latter court that the three first counts of plaintiff's petition were different statements of a cause of action for the alleged recovery by defendants of a certificate of deposit for \$500; that the next three counts were for the values of a certificate of deposit for \$300; and that the seventh count was dismissed on the trial.

Plaintiff prayed actual and punitive damages separately on both causes of action and alleged in each a proper basis for the recovery of both measures of relief. Plaintiff had judgment on the first cause of ac-

tion for \$507.50 actual, and \$937.50 punitive, damages. On the second cause of action plaintiff recovered \$314.50 as actual and \$562.50 as exemplary damages.

The first recovery was rendered on count number two of the petition and the second on count number four. So far as necessary the language and scope of these counts will be adverted to in the opinion. The cause is here under the above quoted order of the Springfield Court of Appeals, based upon the above quoted dissenting opinion of one of its judges and his request for its certification and transfer.

OPINION.

I.

Certification of Case to Supreme Court by Court of Appeals. BOND, J. (After stating the facts as above).—Although no question is made by either of the counsel in this case as to the acquisition of jurisdiction of this court, it is not improper that we should determine that for ourselves before considering the merits of the writ of error by which the cause was taken to the Springfield Court of Appeals. By section six of the Amendment of the Constitution adopted in 1884, specific provision is made by that instrument for the certification and transfer of any case or proceeding pending in any court of appeals to this court, and in the event that method is complied with, this court acquires the same jurisdiction of such case or proceeding as if it had been rightfully brought here by appeal or writ of error from the trial court, and must rehear and determine it. To vest jurisdiction in this constitutional mode it is necessary: First, that the particular court of appeals where the case or proceeding is pending shall render a decision therein, not a mere ruling on a preliminary or interlocutory motion which is not decisive of the case (*Gipson v. Pow-*

ell, 167 Mo. 192); second, some one of the judges of that court must state of record by adequate terms, that he deems the decisions of the majority of the court of appeals contrary to a previous decision of this court or some one of the courts of appeals; third, upon the filing of such a statement by one of its judges the court of appeals must, of its own motion pending the same term, certify and transfer said case or proceeding and the original transcript therein to the Supreme Court; fourth, this procedure was devised to prevent disharmony in the rulings of the appellate courts of this State and to enforce in all others the paramount authority of the "last previous rulings of the Supreme Court on any question of law or equity." [Ex parte Conrades, 185 Mo. 411.]

It has been uniformly held in this State since the adoption of this constitutional provision that this method of transfer of jurisdiction is accomplished solely by the statement of one of the judges of a court of appeals that he deems the ruling on which its judicial action is taken, to be contrary to the previous ruling of this court or some court of appeals. He is not required under the Constitution to employ any set or stereotyped terms to express that idea. It is only necessary that in some authentic way he declares his opinion of the contrariety of the court of appeals with a subsisting previous opinion of this court or some one of the courts of appeals. It does not at all affect the displacement of jurisdiction by this process that the judge so stating should be in error in his opinion or mistaken as to the fact. It is enough to oust the jurisdiction of the court of appeals in any case or proceeding for one of the judges to say in proper words and of record that its decision of any case is in conflict with an unreversed ruling of this court or any one of the courts of appeals. [State ex rel. v. Philips, 96 Mo. 570; State ex rel. v. Smith, 107 Mo. l. c. 531; Clark v. M. K. & T. Ry. Co., 179 Mo. 66; Wilden v. McAllister,

178 Mo. 732; Rodgers v. Fire Ins. Co., 186 Mo. 248; Bradley v. Milwaukee Mech. Ins. Co., 163 Mo. 553, 559; State ex rel. v. Smith, 129 Mo. 585; Smith v. M. P. Ry Co., 143 Mo. l. c. 38.]

In the case at bar the dissenting judge stated of record that "to reverse" this case as his colleagues did "was in direct conflict" with two decisions (naming them) of this court. If there is any potency in words to convey the idea that he thought the decisions of his associates to be contrary to the decisions of this court, then the above terms did express that opinion on the part of the dissenting judge. He could not have expressed that thought more clearly nor distinctly if he had copied the language of the Constitution. It is idle to say that he should have used the word "decision" instead of the words "to reverse" when speaking of the action of the court which he said was "in direct conflict" with the previous decisions of this court. To reverse a case is to decide it; and to speak of a reversal is to speak of a decision, for there can be no reversal without a decision "to reverse." Hence, when Judge Cox stated that the reversal of this case was "in direct conflict" with two mentioned decisions of this court, he, in effect, stated in the clearest and most unequivocal form that the court of which he was a member had rendered a decision—the *causa causans* of its reversal—which was "in direct conflict" with the rulings of the two cited cases in this court.

Neither is there any logical force or value in the suggestion that a "decision" is the judgment of a court and its "opinion" is the mere reason for its judgment. The words "decision" and "opinion" are used interchangeably in juridical literature and especially in many of the cases cited above where this provision of the Constitution was under review. By the use of the word "decision" the Constitution-makers plainly meant the opinions of the respective courts of appeals in conformity to which their judgment or decretal or-

der was made. The Constitution was not concerned with the sums of money awarded to the plaintiff or other decretal orders of the courts further than these were the consequence of the principles of law and equity announced in the opinion or decision and upon which they were based. What the Constitution designed to prevent was repugnancy of rulings between courts of appeals or between them and the Supreme Court, and by "rulings" it meant expositions of the law or the legal reasons upon which the courts rested their judgment on the questions presented or the issues joined. To make these the same, the constitutional provision under review provided that the courts of appeals should have no right to decide a case when any judge of that body stated its decision or opinion, upon which it rendered a judgment, was contrary to a previous ruling of this court or any one of the courts of appeals. It was harmony of doctrine and adjudication which this clause of the Constitution was framed to safeguard, and that was the sole idea, object and extent of section six of the Amendment of the Constitution of 1884. It was the legal antecedents of the judgments of the courts of appeals which the Constitution desired to control, so as to render the jurisprudence of this State a symmetrical and harmonious body of law for the administration of equal justice, measured by the same standards, in all the courts of the State.

In the instant case the cause has come before this court in full accord with the constitutional duty of the Springfield Court of Appeals to certify and transfer it here upon the statement of record of one of its judges that the opinion of his associates was "in direct conflict" with two decisions of this court, and we take jurisdiction of the entire cause. For, although the dissenting judge stated in substance that the action of his associates in reversing a part of plaintiff's recovery was contrary to the decisions of this court, yet, it is

shown by the record that both of plaintiff's causes of action arose out of the same transaction and as that transaction must come before us for review as to one of plaintiff's causes of action it is our duty to determine it with reference to all of the relief claimed by plaintiff. When a cause is sent to this court under this provision of the Constitution it is not transferable by piece-meal, but under the very language of the Constitution this court is possessed of full jurisdiction and "must rehear and determine said cause or proceeding, as in case of jurisdiction obtained by ordinary appellate process." [Const. Am. 1884, sec. 6.] This makes this court the final arbiter of the cause just as if it had been properly appealed to this court after the judgment in the circuit court, and furnishes a salutary rule whereby an appeal or writ of error must be finally determined by one appellate court whose opinion will be the single guide for the trial court in any subsequent proceedings in the cause.

II.

This case was given careful consideration by the Springfield Court of Appeals as is shown by the full opinion written by Judge Nixon and concurred in by a special judge and the dissenting opinion of Judge Cox. The facts and issues are fully stated in the report of the case in 152 Mo. App. 626, and we will not restate them further than to show the grounds of our decision. The gravamen of plaintiff's two causes of action was the recovery against defendants, who were charged to be fraudulent conspirators in the conversion of the amounts of two certificates of deposit for the respective sums of \$500 and \$300, which were issued to the plaintiff for money, which he had earned as a mine-worker, and deposited in two banks. The pith of plaintiff's complaint is that one of the defendants became aware of his possession of the two certificates

and at once invited him to the drinking saloon kept by the other, well knowing his weakness for drink and that he lost his senses when he yielded to it; that after plying him with drink he was enticed into a back room to gamble with the two defendants; that he was made very drunk and his two certificates of deposit were taken from his coat pocket without any consideration and without his knowledge by the fraudulent schemes of the two defendants; that one of them thereafter indorsed plaintiff's name on the backs of plaintiff's certificates and received the money due upon them from the banks and did not deliver it to plaintiff.

The two counts (numbers 2 and 4) of plaintiff's petition upon which plaintiff recovered judgment against defendants, alleged not only the elements for a recovery of actual damages, but also the elements of fraud, malice, oppression and conspiracy on the part of the defendants in perpetrating their joint schemes for obtaining plaintiff's money as a basis for punitive damages. In the full and learned opinion of Judge NIXON, all the points insisted upon by the plaintiff in error relating to the judgment on the second count, were properly adjudged. This conclusion of the Springfield Court of Appeals affirming the verdict and judgment on that count of the petition is approved by us, though we do not approve of some of the views expressed in that opinion which, as we understand them, condition the right to recover exemplary damages upon a recovery of substantial actual damages. That is an inexact statement of the rule. Punitive damages may be recovered where a proper basis therefor is laid in the petition and proved, although the plaintiff recovers only nominal actual damages. [Ferguson v. Chronicle Pub. Co., 72 Mo. App. 1. c. 466; 2 Sutherland on Damages, sec. 406; Lampert v. Drug Co., 238 Mo. 1. c. 418.] In the latter case the learned opinion of ROY, C., reviewed fully the authorities in this State and elsewhere, and reaches the correct con-

clusion that "a verdict for nominal actual damages will support a verdict for punitive damages."

III.

But we do not concur in the disposition made by the majority opinion of the Springfield Court of Appeals of the recovery which defendant in error had under the fourth count of his petition. The substance of the allegations in that count of the petition, while charging the obtention of the \$300 certificate by fraud, conspiracy and procuring the owner to become drunk and a party to a gambling game, did not impute to the defendants the technical crime of larceny. The instruction given for defendant in error on that count properly hypothesized the conditions upon which he could recover actual damages, but it went beyond that and permitted the jury to find punitive damages if they believed the defendants had *stolen* the \$300 certificate of deposit. That part of the instruction relative to punitive damages was not warranted by the particular averments of the fourth count of the petition upon which it was based and should not therefore have been given. But this error could not have prejudiced the plaintiffs in error except to the extent of permitting a recovery of punitive damages on grounds not pleaded in the fourth count of the petition. It did not in any way affect their liability for actual damages, as to which the jury was correctly instructed by instruction number two. The error in the portion of that instruction relating to punitive damages is entirely curable by excising from the verdict of the jury the award made by them of \$562.50 as exemplary damages in their verdict on the fourth count of the petition. In all other respects we hold (as all the members of the Springfield Court of Appeals), that defendant in error is entitled to an affirmance of the judgment recovered by him in the circuit court. If, therefore, the

defendant in error will within the next ten days enter a *remittitur* of \$562.50 of the judgment rendered in his favor in the trial court, the remainder of that judgment will be affirmed, otherwise this cause will be reversed and remanded for a new trial. All concur.

VIRGINIA G. FARRIS et al. v. F. B. BURCHARD
et al., Appellants.

Division One, December 2, 1914.

PROBATE OF WILL: Not Entered of Record: Order Made After Many Years: Evidence. The Revised Statutes of 1855 provided that the clerk of the county court should take the proof of wills in vacation, subject to confirmation or rejection by the court, and that when any will was exhibited, the clerk might receive the proof and grant a certificate of probate or of rejection. In 1865 a will was presented, and the proof of the subscribing witnesses was written, signed, and certified upon the will itself, which was then filed but not recorded. The court, when it met in term, made an order appointing an administrator *c. t. a.* This suit to quiet title having arisen long afterward, involving the provisions of the will, it was held on a former appeal that the proof did not justify the conclusion that the will had been probated. Accordingly the probate court, in 1912, ratified the proceedings of the county clerk, adjudged the instrument proved and ordered it admitted of record. The order and judgment were copied upon the will and signed by the judge. *Held*, that the instrument was thereafter, in the retrial of the suit to quiet title, properly received in evidence as the last will and testament of its signer, and that under it the plaintiffs are entitled to their interests as remaindermen.

Appeal from Gasconade Circuit Court.—*Hon. John W. Booth*, Judge.

AFFIRMED.

August Meyer, C. G. Baxter and Robert Walker
for appellants.

J. W. Hensley for respondents.

BROWN, C.—This case is founded upon section 650 of the Revised Statutes of 1899. It was instituted in the circuit court for Gasconade county December 23, 1907, and has been once before to this court upon the appeal of defendants from a judgment in favor of the plaintiffs, which was reversed and the cause remanded for a new trial. [Farris v. Burchard, 242 Mo. 1.] The question in that appeal was whether, upon the records of the probate court for that county as they then appeared, the will of James Johnson under which the plaintiffs claim their title to an undivided fourth of the land involved, was shown to have been admitted to probate. The opinion of this court in rendering its judgment concluded as follows:

“Whether the parties interested could now present the will for probate, or whether the record is in such a condition as would entitle them now to a judgment *nunc pro tunc*, we express no opinion, because there is no such case before us; but we do feel constrained to say that the proof adduced did not justify the conclusion that the will had been duly probated, and therefore did not justify the judgment that the respondents were entitled to the interest in the land which the judgment gives them. The judgment is therefore reversed and the cause remanded for a new trial.”

Upon the return of the cause to the circuit court the plaintiff Samuel Matthews appeared in the probate court and by written petition stated that he was a devisee in the will as well as heir at law of James Johnson, deceased, who died in 1864 leaving said will, which was on — day of —, 1865, produced in the county court of Gasconade county, Missouri, having at the time probate jurisdiction, and the testimony of the subscribing witnesses thereof was duly and formally taken by the clerk of the court in vacation and in-

dorsed, with his certificate thereto, on the back of said will; that said will has since remained in the custody of the probate court, although no formal judgment of probate has been entered of record by said court, and prayed that an entry of formal judgment of probate be entered on the records of said court upon such proof. The defendant Burchard appeared, filed objections in writing, and opposed the entry of such judgment, but the court, at its August term, 1912, after reciting all the facts upon its record, ordered and adjudged that the instrument be considered proved, and adjudged the same to be the last will of said James Johnson, deceased, and ratified and confirmed the proceedings of the clerk and ordered the will to be admitted of record. A similar order and judgment was then written out and signed by the judge on said will, and it was recorded by the clerk. It also appeared upon the records of the county court that in 1865, after the presentation and proof of the will before the county clerk, Peter W. Burchard was by order of the court duly appointed administrator with the will annexed of the estate of James Johnson, deceased, and was required to give bond as such administrator in the sum of \$15,000; and that he thereupon filed such bond which was by the court approved. The administration of the estate continued from the time of his appointment in 1865 until some time in 1869. The will with the proof and certificates thereon was recorded in the office of the recorder of deeds for Gasconade county on March 29, 1913. The admission of the will in evidence with these record entries constitutes the error relied on by appellant.

The paragraph in the will under which the plaintiffs claim title to an undivided fourth of the land as the only children of the testator's daughter Mary Elizabeth, who was married to one N. G. Matthews, their father, is as follows:

"I give and bequeath all my estate to the use of my wife during her natural life; at her death my estate, or one-fourth of it, to my daughter, Mary Jane; one-fourth to my daughter Susan Ann; one-fourth to my daughter Eliza Virginia; the remaining fourth to my daughter Mary Elizabeth and her bodily heirs, her husband having no control over the same. The income from the one-fourth part of my estate devised to my daughter, Mary Elizabeth, she can have the use of during her natural life, and at her death to go to her bodily heirs, but if she should die without bodily heirs, it is to be divided equally among the bodily heirs of my three daughters above named, viz.: Martha Jane Johnson, Susan Ann Johnson and Eliza Virginia Johnson."

Martha Jane afterward married one Benjamin P. Richardson, Susan Ann married one Perry A. Richardson, and Elizabeth Virginia married one J. W. Cantley. Mrs. Matthews was alive when this suit was instituted but has since died.

The defendant Burchard claims through deeds as follows: (1) deed dated March 1, 1877, from Mrs. Matthews and husband, Mrs. Cantley and husband, and Mrs. B. P. Richardson and husband to Perry A. Richardson for \$150; (2) deed from Perry A. Richardson and wife to Green C. Richardson, dated August 16, 1880, and filed for record May 16, 1908, in which no consideration is expressed; (3) deed from Green C. Richardson and wife to Fred B. Burchard, dated February 28, 1884, and recorded August 12, 1884. While a consideration of \$15,000 is expressed in this deed it was an advancement to the wife of defendant, who was the grantor's daughter.

It was agreed on the trial as follows: "That defendant's father-in-law Green C. Richardson was a purchaser for value of the lands described in plaintiff's petition." The record shows that the oldest child of

Mrs. Matthews, the plaintiff Virginia Farris, was born in 1868.

I. The cause was reversed in the former appeal on the sole ground that the proof adduced at the former trial did not justify the conclusion that the will of Johnson had been duly probated, and therefore did not justify the judgment that the plaintiffs were entitled to the interest in the land which it gave them. It only remains for us to determine whether or not at the last trial the evidential deficiency was supplied. It consisted solely of the absence of a formal judgment of the county court then having jurisdiction in such matters, or of the probate court which succeeded to that jurisdiction, declaring that it and been proven, or, to use a more common expression, admitting it to probate. This court declined to express an opinion as to whether or not the parties in interest could still present the will for probate, or, depending upon the record as it then stood, have judgment entered *nunc pro tunc* to that effect. The cause was remanded that the parties might proceed upon the theory so suggested, and whether the plaintiffs have now succeeded in establishing the probate of the will is the sole question before us.

II. We are not confronted with any question of laches, or failure on the part of the plaintiffs to do everything in their power to protect their own interests, for if they have lost their rights under the will it is on account of neglect of duty on the part of those charged by law with their protection, beginning before the oldest of them was born and continuing until the wrong was consummated. Nor have they neglected to avail themselves in good time of the remedy which was given them as contingent remaindermen by the Act of 1897 (R. S. 1899, sec. 650), by suing while the youngest still lacked two years of his majority, and

while the mother, the life tenant, was still living. On the other hand, there is no question of wrong to an innocent purchaser. While it is stipulated that one of those through whom the title asserted by defendant has passed was a purchaser for value of the lands described in the petition, there is nothing in the record to indicate how much he paid (his deed being silent on that question), or what he knew or did not know. In short, we find nothing in the record inconsistent with the theory that upon the death of the grandmother of plaintiffs, who had under the will a life interest in all the estate both real and personal, the surviving family determined to make the four husbands, who had then become members of it, equal, and quietly suppressed the will, and relegated it to "an old glass cupboard, amongst some school blanks and old letters and other things cast aside . . . as being apparently of no value." It seems to have been a family by which husbands were appreciated, for the title was gathered in one of them, Perry A. Richardson, before being conveyed to Green C. Richardson, and the latter conveyed it to his defendant son-in-law as a gift to his daughter. The Matthews children, to whom Mr. Johnson had done everything in his power to secure their mother's share in his estate, were ignored.

III. Coming to the real question, whether the judgment admitting the will to probate entered in 1912 after this cause was sent down to the circuit court for retrial entitles it to be admitted as evidence of plaintiffs' title, we will first consider the statutes regulating the duties of the probate courts in such matters, by which these records must be judged. In doing this we will refer to the Revision of 1855, in force at the time. Section 14, p. 1569, is as follows: "The county court, or clerk thereof in vacation, subject to the confirmation or rejection by the court, shall take proof of last wills." Section 16 provides: "When any will is ex-

hibited to be proven, the court or clerk may immediately receive the proof, and grant a certificate of probate, or, if such will be rejected, grant a certificate of rejection." The measure of proof required from the subscribing witnesses is that the testator signed the writing as his last will, that he was of sound mind, and that they respectively subscribed their names thereto in his presence. This must be reduced to writing, signed by the witnesses and certified by the clerk (secs. 18, 21). All this was done and the proof of the will was complete, subject only to the confirmation of the court in term; so that the controversy is reduced to the question as to whether this confirmation was shown by the record introduced in the last trial, for unless such confirmation appears in the record the will is not properly before the court and the plaintiffs have failed to show any title.

There is no question but that upon taking the proof of the will as shown by his certificate in evidence, the clerk could have immediately issued in vacation, subject to the confirmation or rejection of the court, letters of administration with the will annexed under the first section of the act relating to the appointment and removal of executors and administrators. [R. S. 1855, p. 113.] It was not necessary that the will should have been recorded. Its record required no order of the court, but rested solely with the clerk, upon whom the statute imposed the duty. [Sec. 26, p. 1571.] It was required by the section last cited to be done within thirty days after probate, and is coupled in the same section with the other clerical duty to carefully file the original in his office. We can see no reason why the failure to perform either of these duties should have any more or different effect upon the validity of the proof already made than would attend such failure in case of the other.

While the clerk had the right to issue letters founded upon the probate of the will in vacation, he

did not do so, and when the court met in term it made an order appointing Burchard administrator of the estate with the will annexed. That the jurisdiction to make this order was derived from the probate of the will is evident. If the confirmation by the court of the act of the county clerk in taking and certifying the proof was necessary to its validity, it was confirmed by this appointment, which can rest on no other foundation than the will. It stands upon the same footing as would the act of the clerk in issuing ordinary letters of administration in vacation "subject to the confirmation or rejection of the court" under the first section of the administration act. If, in such a case, the act of the clerk should not be confirmed in express terms, but the administration should proceed under the direction of the court to final settlement, it would seem technical to the point of rashness to say that all the proceedings would be void, and afford no protection to the actors because the failure of the court to enter a formal order of "confirmation" had been equivalent to the rejection of the clerk's appointment. The same words are used with reference to the probate of wills by the clerk in vacation, and the same reason exists why it should continue in effect until rejected by the court. [Potter v. Adams' Executors, 24 Mo. 159, 163.] When the administrator was appointed and had given bond it became his duty (sec. 16, p. 115) to "faithfully execute the last will of the testator, pay the debts and legacies, as far as the assets will extend and the law directs." We will presume, in the absence from the record of anything to the contrary, that during the entire period of the administration he faithfully performed these duties, and although the personal estate must have been considerable, as indicated by the amount of the bond exacted from him, that he delivered it all, after the payment of the debts, to the widow, the sole legatee. This having been done, we see no reason

why, upon the death of the widow, the estate should be diverted from the testamentary channel.

IV. This will has, during all the time that has elapsed since it was presented to the clerk of the county court for probate soon after the death of the testator, been in the custody provided by law for that purpose. So far from evidence having been lost or its production impeded or embarrassed, the very testimony which the law has prescribed as the best evidence of its execution has been perpetuated and certified in such form that it cannot be separated from the instrument. So far as its having been concealed or kept from the notice of those interested, it will be presumed that they were given the opportunity to execute its provisions. [R. S. 1855, p. 114, sec. 10.] Under these circumstances we have no doubt of the power of the court to enter a judgment in form confirming the act of the clerk and establishing the will as it did at its August term, 1912. No Statute of Limitations applies to and bars the right of the court to put in proper form at any time that which appears from its records to have been done and to have been imperfectly or informally recorded. [Martin v. Brown, 162 Mo. App. 223, 228; Dawson v. Waldheim, 89 Mo. App. 245; Hansbrough v. Fudge, 80 Mo. 307; Smith v. Steel, 81 Mo. 455.] The same rule ordinarily applies to those cases in which nothing remains for the court to do but to enter the particular judgment which the law prescribes upon the facts appearing in its record. In this case both these conditions exist. The statutory evidence is taken and certified to the court without any word or fact tending to impair its statutory effect. The statutory judgment was then due without any further proceeding. The matter was still pending for that purpose. It was not formally entered, but the court did make an order which confirmed the probate of the will by adopting and acting upon it, and we have no

doubt that the clerk might and should have then entered on his minutes words equivalent to the statement that *the probate of the will was confirmed* and Peter W. Burchard appointed administrator with the will annexed of the estate. This case in its facts illustrates the two classes of cases which mark the distinction between the power of the court upon notice and with due regard for intervening rights to pronounce and enter the judgment of the law upon the facts which should conclude a pending proceeding, notwithstanding it may have been delayed beyond the usual time for doing so, and its power to scan its record to ascertain from it what judgment it has pronounced and to correct any failure of the clerk to properly enter it. In this particular case a judgment of probate entered upon either theory must, from its nature, relate not only to the date of the pronouncement but to the date of the death of the testator, so as to prevent a hiatus in the title to the property of which it disposes. Even the appointment of the administrator necessarily relates to the same period. [3 Redfield on Wills (3 Ed.), 46.] For this reason it make no difference in its effect whether we call it an original judgment or a judgment *nunc pro tunc* under the classification we have suggested. It clearly falls, however, within the latter class. [Hansbrough v. Fudge, *supra*; Smith v. Steel, *supra*.]

It follows from what we have said that the judgment of August 26, 1912, probating the will under which the plaintiff claim was properly admitted in evidence, and the judgment of the circuit court is affirmed. *Blair, C.*, concurs.

PER CURIAM.—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All the judges concur.

W. L. TOLER and MARY L. TOLER, Appellants, v.
JAMES A. JUDD et al.

Division One, December 2, 1914.

FRAUD: Suit to Recover Decedent's Personal Property: Cannot Be Maintained By Heirs. The heirs of decedent, so long as his widow is administratrix, cannot maintain suit to recover the value of a stock of merchandise out of which he was fraudulently cheated by defendants—not even by joining the administratrix, on her refusal to sue, as a defendant. Such suit can only be maintained by the administratrix as plaintiff; and if she refuses to sue, the remedy of the heirs is to sue on her bond, or to bring proceedings in the probate court to have her removed as administratrix and another appointed in her stead.

Appeal from Macon Circuit Court.—*Hon. Nat. M. Shelton*, Judge.

AFFIRMED.

Weatherby & Frank and *Higbee & Mills* for appellants.

The court erred in sustaining the demurrer to plaintiffs' petition. It states a good cause of action in equity. Plaintiffs are the equitable owners of the stock of merchandise, subject to the widow's rights therein, and on her neglect or refusal to sue, or join in this action, are entitled to the relief prayed in the petition; and upon the annulment of the exchange are entitled to have the value of the stock of merchandise paid over to the administratrix as assets of the estate. *Ford v. Hennessy*, 70 Mo. 593; *Story's Eq. Plead.*, sec. 170; *Richardson v. Cole*, 160 Mo. 372; *Trotter v. Mutual Reserve Assn.*, 70 N. W. 843; *Bem v. Shoemaker*, 74 N. W. 239; *Buchanan v. Buchanan*, 22 L. R. A. (N. S.) 461; *Samuel v. Marshall*, 3 Leigh, 567; *Padgett v. Smith*, 206 Mo. 309.

E. C. Lockwood and J. W. Peery for respondents.

(1) The legal title to the personal estate of a decedent vests in his administrator. The heir can acquire no title thereto except through an administration in the probate court, and therefore has no right to maintain an action with respect to the personal estate. *Leaky v. Maupin*, 10 Mo. 368; *State to use v. Fulton*, 35 Mo. 323; *Smith v. Denny*, 37 Mo. 20; *Vastine v. Dinan*, 42 Mo. 269; *State ex rel. v. Moore*, 18 Mo. App. 406; *Becraft v. Lewis*, 41 Mo. App. 546; *Hellman v. Wellenkamp*, 71 Mo. 407; *Pullis v. Pullis*, 178 Mo. 683; *Brueggeman v. Jurgenson*, 24 Mo. 87; *Griesel v. Jones*, 123 Mo. App. 45; *Orchard v. Store Co.*, 225 Mo. 414; *Hillman v. Schwenk*, 68 Mich. 297; *Bourget v. Monroe*, 58 Mich. 566; *Hanenkamp's Admr. v. Borgmier*, 32 Mo. 569. (2) If an administrator, in a proper case refuses to bring an action for the recovery of the personal property belonging to the estate, the remedy of the heir is either to sue him upon his bond, or to institute proceedings in the probate court to have him removed and another appointed in his stead. *R. S. 1909*, secs. 34, 50; *Hellman v. Wellenkamp*, 71 Mo. 407; *Pullis v. Pullis*, 178 Mo. 683; *Hillman v. Schwenk*, 68 Mich. 300; *Flynn v. Flynn*, 183 Mass. 365; *Pritchard v. Norwood*, 155 Mass. 539; *Putney v. Fletcher*, 148 Mass. 247; *Scruggs v. Scruggs*, 105 Fed. 28; *Moore v. Fidelity Co.*, 138 Fed. 1; 2 *Woerner's Am. L. Adm.* (2 Ed.), p. 674, sec. 322; *Butler v. Roer*, 163 Mo. App. 287; *Morrow v. Morrow*, 113 Mo. App. 444.

WOODSON, P. J.—This is a bill in equity, instituted by the plaintiffs against the defendants in the circuit court of Macon county, to set aside and cancel a certain contract made and entered into by and between one E. F. Toler and James A. Judd, by which the former traded a certain stock of goods at Mc-

Fall, Missouri, to the latter for certain real estate, and other considerations, located in Macon county.

There was a demurrer filed to the bill, which was by the circuit court sustained, and the plaintiffs declining to plead further judgment was duly rendered against them. In due time and in proper form the plaintiffs appealed to this court.

This state of the record requires this court to pass upon the sufficiency of the bill, and the demurrer filed thereto. The bill is as follows:

“Plaintiffs for their cause of action state that on and prior to January 31, 1910, one E. F. Toler was the owner of a general stock of merchandise of the value of \$16,500, then located and situated in a certain store building occupied by him in the town of McFall, in Gentry county, Missouri; that the defendant Judd was then the owner in fee of certain lands located in Macon county, Missouri, to-wit:

“Fifteen acres off the south end of the west half of the northwest quarter; and the east half of the northwest quarter, and the west half of the northeast quarter, and the southeast quarter of the northeast quarter, and the north half of the southeast quarter, all in section 6, township 57, range 17, containing 295 acres more or less, subject to certain deeds of trust aggregating about \$4000 principal; that said lands were then not worth to exceed \$25 per acre, or \$7375 in the aggregate, and the said Judd’s equity of redemption therein was not worth to exceed \$3375; that the said E. F. Toler was then, and for a long time prior thereto had been, broken down in health, physically and mentally weak, of unsound mind, incapable of transacting business, easily susceptible to persuasion, influence and suggestions, and in constant fear and dread of death, and suffering from a mortal illness, as the defendants and each of them then well knew.

“Plaintiffs further state that the defendant, James A. Judd, well knowing the said condition of the

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said E. F. Toler physically and mentally, with the intention, design and purpose to fraudulently cheat and defraud the said E. F. Toler out of his said stock of merchandise, did falsely and fraudulently represent to the said E. F. Toler that the said lands of the said James A. Judd were of the value of \$60 per acre, and with the fraudulent purpose aforesaid, proposed to the said E. F. Toler that he would sell and exchange his equity in said lands in Macon county, Missouri, at the valuation of \$13,700, taking the said Toler's stock of goods in exchange therefor at the valuation of \$16,500, and would settle the difference in favor of said Toler of \$2800 in certain notes that said Judd then held on persons living on or in the neighborhood of said lands in Macon county, Missouri, which said Judd falsely and fraudulently represented to said Toler were good, solvent and collectible notes.

"Plaintiffs further state that said E. F. Toler was not acquainted with the said lands of the said Judd in Macon county, Missouri, and was wholly ignorant of the value of said land, and was wholly ignorant of whether the said notes for the said sum of \$2800 were solvent and collectible, all of which the defendant Judd then well knew, and the said Judd importuned and constrained the said E. F. Toler to make said exchange of said stock of goods for the said lands in Macon county, Missouri, and the said \$2800 in notes, the said E. F. Toler being wholly unable to resist the importunities, persuasions and constraint of the said Judd for that purpose, as the said Judd then well knew, and said Toler wholly relying upon the said representations of the said Judd, and being unable to resist his importunities and persuasions, was induced thereby to sell and deliver to the said Judd his said stock of goods in exchange for said lands and said notes for \$2800, and did on January 31, 1910, so wholly relying upon said representations of the said Judd, and being so fraudulently influenced by the said Judd, as aforesaid, sell

and deliver to him his said stock of goods, and received in exchange therefor a deed from the said James A. Judd and his wife conveying said lands to him, the said E. F. Toler, and Ida E. Toler, the defendant, his wife, subject to four certain deeds of trust upon said lands to secure the payment of four several notes therein described, aggregating the sum of \$4000 principal, the said Judd then assigning and transferring without recourse to the said E. F. Toler and Ida E. Toler, his wife, said notes aggregating the said sum of \$2800; and plaintiffs aver that the said representations of the said James A. Judd were wholly false; that said lands were not worth to exceed \$25 per acre, and the equity of redemption of the said James A. Judd therein was not worth to exceed \$3375, and the said notes for the sum of \$2800 were not collectible, and the makers thereof were insolvent.

“Plaintiffs further state that they do not know and are unable to state the names of the makers of said notes.

“Plaintiffs further state that immediately upon effecting said exchange, the defendant James A. Judd, took possession of the said entire stock of goods so owned by said E. F. Toler, and removed the same from said town of McFall and has converted the same to his own use.

“Plaintiffs further state that the said E. F. Toler, of the said illness of which he was then suffering, as aforesaid, died on or about March 1, 1910, intestate and without issue, being at the time of his death a resident of Gentry county, Missouri, and left surviving him his widow, the defendant Ida E. Toler, and the plaintiff W. L. Toler, his brother, and Mary J., his mother, his only surviving heirs; that the father of E. F. Toler had theretofore died, and that said E. F. Toler had no sisters or brothers, or their descendants surviving him, other than his brother W. L. Toler.

“Plaintiffs further state that immediately upon the death of said E. F. Toler, the defendant Ida E. Toler, took out letters of administration and was appointed administratrix of the estate of E. F. Toler, by the probate court of Gentry county, Missouri, and duly qualified, and has ever since been, and now is acting as such administratrix; that plaintiffs have requested the said Ida E. Toler to join with them in this action; and have been unable to obtain her consent, and she has refused to join with them in this action, either individually or as administratrix of the estate of E. F. Toler, deceased, and they have for that reason made her a co-defendant in this action, individually and as administratrix of the estate of said E. F. Toler, deceased.

“Plaintiffs further state that they are willing, and now offer, to convey to the said James A. Judd any interest that might or would pass to them in the lands above described by reason of said conveyance of the said James A. Judd and his wife to the said E. F. Toler and Ida E. Toler, and are willing to transfer to said James A. Judd any interest they may or might have in said notes for \$2800, and they pray that said sale and exchange of said stock of goods so owned by said E. F. Toler for the said lands in Macon county, Missouri, and said notes for \$2800 be cancelled and set aside, and for naught held, and that the said defendant, James A. Judd, be required to account for and to pay over to the administratrix of the estate of the said E. F. Toler, the said sum of \$16,500, the value of said stock of goods so owned by the said E. F. Toler, and that judgment be rendered in favor of Ida E. Toler, as administratrix of the estate of E. F. Toler, deceased, for the sum of \$16,500 with interest and costs of suit, and that she be required to return to the said James A. Judd the said notes for \$2800, and to reconvey to said Judd said lands in Macon county, Missouri, and for other proper relief.”

The demurrer was as follows:

“Now come the defendants and demur to the petition of plaintiffs filed herein, and assign the following grounds of demurrer, to-wit:

“First, because said petition fails to state facts sufficient to constitute a cause of action.

“Second, because said petition fails to state facts sufficient to constitute a cause of action in favor of the plaintiffs and against the defendants.

“Third, because said petition shows upon its face that plaintiffs have no legal capacity to sue herein.

“Fourth, that there is a defect of parties plaintiff, in that under the allegations of the petition, the administratrix or administrator of the estate of said E. F. Toler, deceased, is a necessary party plaintiff to this action.

“Fifth, because there is an improper joinder of parties plaintiff in that said W. L. Toler and Mary J. Toler have no right or authority to maintain this action, and are improper parties plaintiff herein.

“Sixth, because said petition shows upon its face that the cause and right of action, if any exists, is in the administratrix of the estate of E. F. Toler, deceased, and the remedy of the plaintiffs, if any they have, must be pursued in an entirely different proceeding from that sought to be maintained in this action.

“Seventh, because said petition, in effect, attempts to divest the defendant, Ida E. Toler, of her title to the real estate therein mentioned, and the same fails to allege any fact or facts, showing, or tending to show, that the said Ida E. Toler participated in any pretended or alleged fraud claimed to have been perpetrated upon the said E. F. Toler, deceased, in the sale of said stock of merchandise, or the conveyance of the real estate in said petition described.

“Eighth, because said petition fails to state the specific facts and acts of the defendant Judd which it is claimed constituted fraud or undue influence, and

fails to state any specific facts amounting in law to fraud sufficient to justify the rescission of said contract of sale.

“Ninth, because said petition fails to allege that the said E. F. Toler did not see or examine the real estate mentioned in said petition, and fails to allege that he did not investigate the solvency of the makers of the notes therein mentioned; or that he was prevented from making such examination of such land, or such investigation of the solvency of the makers of said notes, by any act or conduct on the part of the defendant Judd.”

I. It will be observed by reading this bill that it states that E. F. Toler and Ida E. Toler, at the time of the execution of the contract mentioned, were husband and wife; that after its execution the husband, E. F. Toler, died intestate, leaving surviving him his widow, Ida E. Toler; his mother, Mary J. Toler and a brother, W. F. Toler, as his only heirs at law; that Ida E. Toler was the duly appointed and acting administratrix of her deceased husband's estate.

Upon that state of facts counsel for defendants contend, among other things, that since the object of the suit was to annul the contract and recover back the stock of merchandise, which of course was personal property, it could not be maintained by the plaintiffs, although it being admitted by the demurrer, that they were heirs of the deceased, for the reason that the title to personal property of a deceased person vests in his administrator, and that the heir can acquire no title thereto except through an administration of the estate through the probate court, which has not been done, rather completed, in this case.

The following authorities cited by counsel for defendants fully sustain this contention, viz.: *Leakey v. Maupin*, 10 Mo. 368; *State to use v. Fulton*, 35 Mo. 323; *Smith v. Denny*, 37 Mo. 20; *Vastine v. Dinan*, 42

Mo. 269; State ex rel. v. Moore, 18 Mo. App. 406; Becraft v. Lewis, 41 Mo. App. 546; Hellman v. Wellenkamp, 71 Mo. 407; Pullis v. Pullis, 178 Mo. 683; Brueggeman v. Jurgensen, 24 Mo. 87; Griesel v. Jones, 123 Mo. App. 45; Orchard v. Store Co., 225 Mo. 414; Hillman v. Schwenk, 68 Mich. 297; Bourget v. Monroe, 58 Mich. 1. c. 566; Hanenkamp's Admr. v. Borgmier, 32 Mo. 569.

We, however, do not understand that counsel for plaintiffs controvert the conclusion previously announced, but seek to evade the effect thereof by saying that, because they are heirs of the deceased Toler, and therefore the equitable owners of the stock of goods, subject to the widow's marital rights therein, and her neglect or refusal to sue or join them in the suit, entitled them to institute and maintain this action against her individually and as administratrix, as well as the other defendants.

This position of counsel for plaintiffs is untenable, for the reason that this court has repeatedly held that if an administrator, in a proper case, refused to bring an action for the recovery of personal property belonging to the estate, the remedy of the heir is either by a suit on his bond, or to institute proper proceedings in the probate court to have him removed from office, and have another appointed in his stead. Among such cases are the following: Hellman v. Wellenkamp, 71 Mo. 407; Pullis v. Pullis, 178 Mo. 683; Hillman v. Schwenk, 68 Mich. 1. c. 300; Flynn v. Flynn, 183 Mass. 365; Pritchard v. Norwood, 155 Mass. 539; Putney v. Fletcher, 148 Mass. 247; Scruggs v. Scruggs, 105 Fed. 28; Moore v. Fidelity Trust Co., 138 Fed. 1; 2 Woerner's Am. L. Adm. (2 Ed.), p. 674, sec. 322; Butler v. Roer, 163 Mo. App. 283, 1. c. 287-288.

The cases cited by counsel for plaintiffs are not in point. They are cases where the beneficiary has in certain cases been permitted to sue where the trustees, officers and directors of corporations, etc., have declined

to sue; but they are based upon the ground that those beneficiaries, stockholders, etc., have no other remedy. The books are full of such cases, and the doctrine therein announced is so familiar to the bench and bar it would be useless to cite them. But the case at bar is not embraced in that class, for the reason that the law affords the plaintiffs ample remedy, as is shown by the authorities last cited.

We are, therefore, of the opinion that the judgment of the circuit court should be affirmed; and it is so ordered. All concur.

B. L. LYMAN v. HORACE DALE, Appellant.

Division One, December 2, 1914.

1. **NEGLIGENCE: Pleading in Justice Court.** If a plaintiff elects to plead his cause of action brought in a justice of the peace court, he is bound by the allegations of his statement filed therein the same as he would be by the allegations of a petition filed in the circuit court. For instance, if he sues in tort, and specifically states the negligence on which he relies to recover, he must recover for that negligence and none other.
2. ———: **Allegation and Proof: Wild Mule.** Where plaintiff charges that defendant was guilty of negligence in handling a "wild and unruly mule," which, as it was being led along a public street, ran into his buggy and broke down a wheel thereof, he cannot recover damages unless he proves that the mule was "wild and unruly."
Held, by LAMM, J., concurring, that, there being no evidence tending to show the mule was "wild and unruly," such a mule is not *per se* a nuisance, a vicious animal, so that when led by a halter, his owner must answer for damage done by his hind foot to the wheel of a passing buggy, or other acts.
3. **NEGLIGENCE: Leading Mule Upon Public Street: Five-Foot Rein.** The leading of a mule upon a public street, with a halter rein five or six feet long, is not negligence, unless some

vicious propensity of the animal be pleaded and shown; and the court should so declare as a matter of law.

Held, by LAMM, J., concurring, that it is not negligence to ride one mule and lead another along a public street unless they are halter-yoked "neck and neck;" and especially in this case, because the injury to plaintiff's buggy was caused by the mule's hind leg getting into the wheel and there is no causal connection between the injury to the wheel caused by the hind leg and the failure to halter the mules neck and neck.

4. ———: ———: ———: **Expert Testimony.** Experts are not competent to testify that the proper way for handling mules being led along a public street is to halter them closely together. The matter is not one of expert exposition.
5. ———: ———: ———: ———: **No Objection.** Where the question is not one calling for opinion evidence the case is not changed on appeal by the fact that expert testimony was admitted without objection.

Appeal from Greene Circuit Court.—*Hon. James T. Neville*, Judge.

REVERSED.

W. D. Hubbard and *J. T. White* for appellant.

The court erred in overruling defendant's demurrer to the evidence: (1) The negligence alleged was leading "a wild and unruly mule" in a "careless and negligent manner." There was a total failure of proof. The mule was quite gentle. A careless manner of leading a gentle mule is not alleged. In order to recover plaintiff was obliged to prove that the mule was wild and that defendant knew it. *Cathorn v. Walsh*, 7 Mo. App. 588; *O'Neil v. Blase*, 94 Mo. App. 662. It is not alleged that defendant knew the mule was wild or unruly, and hence no cause of action is stated. (2) There is no evidence of negligence whatever sufficient to make out a case, even if the petition had been in accordance with the facts. (a) There is no evidence that leading a gentle mule, holding the halter rope by hand is negligence. Common sense teaches that it is not. One

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on first thought would not think of leading a Missouri mule in any other way. Of course, it might occur to one that "wild and unruly mules" should be necked together. (b) It is certainly not a negligent act to lead a mule by a five-foot rope. That is as close as one desires to get to this same Missouri mule. (3) Leading the mule in the manner complained of was not the proximate cause of the accident. The obstruction in the street caused the mule to shy. The length of the rope would not prevent the mule from breaking loose. The obstructions were the proximate cause. *Hodges v. Railroad*, 135 Mo. App. 683; *Lawrence v. Ice Co.*, 119 Mo. App. 327; *Bokamp v. Railroad*, 123 Mo. App. 270; *Haley v. Railroad*, 179 Mo. 35; *Saxton v. Railroad*, 98 Mo. App. 494.

Roscoe Patterson for respondent.

GRAVES, J.—This case involves the magnificent sum of five dollars. It reaches us under a certification from the Springfield Court of Appeals. We are enlightened by three well written opinions from the three respective members of that court. The facts we shall state for ourselves. Plaintiff having had one wheel of an old buggy somewhat demolished by coming in contact with a mule belonging to defendant, but being led by an employee of defendant, sought damages therefor before a justice of the peace, in October, 1909. He thus challenges his enemy in an amended petition filed before such justice:

"Plaintiff for an amended petition states that on the 2d day of October, 1909, at the county and State of Missouri, he was driving a horse and buggy along Walnut street, between South and Jefferson streets, in the city of Springfield, on the right hand side of the street; that defendant's agent and employee, on the aforesaid date, was leading a wild and unruly mule along the aforesaid street in such a careless and negli-

gent manner as to permit said mule to run into and against plaintiff's said buggy, thereby injuring and breaking the wheel and axle of said buggy and damaging the same to the extent of five dollars.

"Plaintiff further states, that at the time of the accident aforesaid, defendant's agent and employee leading said mule was acting in the scope of his employment.

"Wherefore plaintiff prays judgment in the sum of five dollars."

As we gather the facts plaintiff has been successful throughout from the justice's court up to the present. In the Court of Appeals his success was by a divided court. In this court he stands behind the fortification erected by his judgment, and submits his case here without brief. A yellow slip of paper found in the files here bears the ominous inscription, "The Celebrated Mule Case," and nothing more. Why we were thus enlightened by this otherwise silent monitor we know not. It at least admonishes to look well to the facts. Plaintiff and his brother and father-in-law were driving east on Walnut street in Springfield, Missouri, in plaintiff's buggy, and at a point where there was some digging in the street and some brick piled up in the street, met defendant's employee, James S. Parker, who was riding one mule and leading another; both mules were of good size, and the one being led was gray in color, if the color is material. According to plaintiff's evidence the halter strap by which the mule was led was five or six feet long—two witnesses say five, and another says five or six feet. It was being held near the end. In passing the bricks the mule shied across to the buggy and got his hind leg between the shaft and the wheel and in extricating itself damaged the wheel. Plaintiff's theory of the case is made to appear by the following evidence. Plaintiff himself says:

"Q. Do you know the customary manner of managing mules when they are being led over the street? A. I don't know what lots of people do, but I know what I do with them. I would neck them together so they could not spread all over the street.

"Q. How would be a proper way to handle them? A. That would be a proper way to handle them I think, would be to neck them together when you go through a crowded place like that.

"Q. How was he leading this mule? A. At the end of the halter rope.

"Q. How long was that rope? A. About five feet, the best I could tell."

The brother said:

"Q. Tell the court the proper manner to handle them? A. In a place where you are likely to have any difficulty with mules you neck them right up short together.

"Q. Can they be handled at all by giving five feet of rein? A. No man can handle a mule of any size by a halter rein. If you are handling a mule you have got to halter him up close to you."

The father-in-law said:

"It was his hind leg — got it in between the wheel and shaft. I said the front wheel. That is all I know about it. I didn't see any misbehavior in the mule until we got right up to them. He shied at something. I don't know what it was. There was a lot of brick on the north side and some dirt thrown up there. If there were any red lights there they were not lit up, because it wasn't dark enough. I quit work that day at six o'clock. I had not taken any whiskey. I don't drink. We were sitting in the seat and he was sitting on our knees. This did not happen very suddenly. It didn't take but a few minutes, but the mule got the best of us. It was somewhere about a minute in happening. I did not see any misbehavior in the man who was riding the other mule, only he couldn't handle the

mule, is all. He didn't have them up so he could handle them. I am not very much of a mule-handler. He could have tied them up closer than he did. I don't think he was tied up at all. I think he was leading the mule at the end of the rope."

There is no evidence in the case to the effect that the mule in question was wild and unruly, or that defendant had any knowledge of the animal being unruly or wild, if it was so, in fact. Defendant said that the mule was well-broke, but a little high-lifted, and this is as far as the evidence in behalf of the defendant adds to plaintiff's case. Defendant demurred to the evidence at the close of the plaintiff's case and again at the close of the whole case. Plaintiff's right to recover under the pleadings and under the evidence is thus squarely presented.

I. There are at least two reasons why this judgment should be reversed. It is true that in justices' courts the same strict formalities of pleadings are not required as in the circuit court, but it is further true that, if the plaintiff elects to plead in strictness in such court, he is bound by his pleadings there as he would be elsewhere. By this we mean, if he is suing in tort, and specifically states the negligence upon which he relies to recover, he must recover for that negligence and none other. In the case at bar, what is the negligence upon which the plaintiff seeks to recover? Is it the negligent handling of a mule, an ordinary average mule, or is it the negligent handling of a *wild and unruly mule*? And if the latter, has there been a case made? This is the first proposition in the case. We have set out in full the plaintiff's statement of his cause of action. A reading of that statement shows that the plaintiff was undertaking to charge the careless and negligent handling of "a wild and unruly mule." Counsel for plaintiff,

Pleading In
Justice's
Court:
Allegations
Must be
Proved.

who drew and signed the petition for plaintiff, recognized that what would be a negligent handling of a wild and unruly mule might not be a negligent handling of an ordinary mule. He canvassed his facts and then charged that defendant was guilty of a negligent handling of "a wild and unruly mule." This was the case defendant was called upon to meet. When, therefore, it was made to appear that the defendant had not handled "a wild and unruly mule" at all, the case stated had failed. Under the pleadings the defendant was not required to come prepared to meet the question of a negligent handling of an ordinary mule, but on the other hand the plaintiff if permitted to recover, must recover upon the case made by his pleadings. Under the case pleaded, his proof failed, and the court should have directed a verdict for the defendant.

II. But even grant it that the petition in this case is in such form and substance as to permit a recovery upon the proof of a negligent handling of a mule, without reference to the "wild and unruly" characteristic of the animal, as two of the judges of the Court of Appeals thought, yet should there have been a recovery under the evidence? We think not.

Plaintiff's theory is that the leading of a mule, somewhat "high-lifed" or high spirited, upon a street, where a portion of the street was torn up by digging, and in which was piled bricks in a long continuous row or pile, by a halter, with a rope five feet long, was negligence. There is no question but that there was ample space in the obstructed street for the same passage of both the buggy and the mules. It is true that plaintiff's witnesses say that the mules should have been haltered together or something of that kind. This is their expert view of the situation, but we hardly think that the question is one calling for opinion evidence, and although such was admitted without objection, the case here is not changed by reason of that fact. [St.

Louis v. Roche, 128 Mo. 541; Boggs v. Laundry Co., 171 Mo. 282; Thompson on Trials, sec. 691.]

The use of a halter with a rein of five or six feet for the leading of both horses and mules upon the public highway is one of such long standing that expert testimony has no place in such a case. Not only so, but such a leading is not negligence, at least it is not negligence unless some vicious propensity of the animal be pleaded and shown. In this case we have no vicious propensity pleaded or proven. It is true that the petition charges that the mule was "wild and unruly" (not strictly a vicious propensity), but even that was not shown. Without some proof of vicious propensities, the trial court should have said that the mere proof that the defendant led the mule by a halter rein five or six feet long was no evidence of negligence upon his part. To hold that such conduct amounted to negligence is to overthrow all common knowledge as to the handling of animals upon the public highways. Courts must not blind themselves to common knowledge. The proof made in this case failed to show negligence in any degree, and the judgment from start to finish should have been for defendant. [Eddy v. Union R. Co., 56 Atl. 677.]

We regret to feel constrained to thus abruptly terminate "The Celebrated Mule Case," but it should have been so determined long since. Let the judgment of the circuit court be simply reversed so that there will be an end to the controversy.

All concur; *Lamm, J.*, in separate opinion.

CONCURRING OPINION.

LAMM, J.—It was Dr. Johnson (was it not?) who observed that Oliver Goldsmith had "contributed to the innocent gayety of mankind." (*Nota bene*: If, as a pundit tells me, it was Garrick and not Goldsmith Johnson spoke of, and if in quoting I misquote, then,

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memory has played a trick upon me and a learned bar will correct me. Time and weightier matters press me to go on and leave the "quotation" (?) stand.) The function of this suit is somewhat the same. Beginning with the "J. P's" it has reached the "P. J's," and its journey has run the gamut of three courts, one above the other. Now, *secundum regulam*, it, a fuss over five dollars, has reached the highest court in the State for final disposition—all this because (1) of divergence of opinion among our learned brethren of the Springfield Court of Appeals, and (2) the provisions of the Constitution in that behalf made and provided. However, if the amount at stake is small, the value of the case for doctrine's sake is great.

As I see it, the case is this: Dale, a man of substance, a farmer, owned a brown and a gray mule, both young and of fine growth; one saddlewise, the other otherwise. Both, used to the plow and wagon, were entitled to the designation "well-broke and gentle." One Parker was Dale's manservant and in the usual course of his employment had charge of these mules. On a day certain he had driven them to a water wagon in the humble office of supplying water to a clover-huller in the Ozark region hard by its metropolis, to-wit, Springfield. Eventide had fallen, i. e., the poetical time of day had come when the beetle wheels his droning flight, drowsy tinkling lulls the distant folds and all the air a solemn stillness holds. In other words, dropping into the vernacular, it was time to "take out." Accordingly, Parker took out, with his mind fixed on the watch dog's honest bark baying deep-mouthed welcome as he drew near home. He mounted the ridable mule. He says he tied the other to the hames of the harness on the ridden one by a four-or-five-foot halter rope, and was plodding his weary way homeward *a la* the plowman in the Elegy. The vicissitudes of the journey in due course brought him to Walnut street in said city of Springfield. At a certain

place in that street the city fathers had broken the pavement and made a "rick of brick" aside a long hole or ditch. Hard by this rick of brick was a ridge of fresh earth capped by a display of red-lantern danger signals. It seems the unriden mule crowded against the ridden one and harassed Parker by coming in scraping contact with his circumjacent leg. Any boy who ever rode the lead horse in harrowing his father's field will get the idea. In this pickle he took hold o. the halter rope, still fastened to the hames, to keep the unriden mule from rasping his said leg. It might as well be said at this point that witnesses for plaintiff did not observe that the end of the rope was attached to the hames of the ridden mule. As they saw it, Parker was leading the mule. As will be seen a bit further on, at this point a grave question arises, to-wit, is it negligence to lead a mule by hand or should he be fastened "neck and neck" to his fellow? But we anticipate.

Going back a little, it seems as follows: At about the time Parker had reached said part of Walnut street, plaintiff and two others were in a buggy pulled by a single horse and on their own way home to the country. So equipped, these several parties met face to face. At this point it will do to say that while the mules were used to being on the water wagon, it is not so clear that these travelers three were. There are signs of that artificial elation in the vehicle party that in the evening springs from drinking ("breathing freely"), but on the morning after produces the condition of involuntary expiation Dr. Von Ihring calls "katzenjammer." They disavow being half-seas-over or drunk. Their chief spokesman, as descriptive of the situation, in part told his story mathematically in this fashion: *"I had not drank so much but what I kept count. I can keep count until I take three and hadn't quit counting yet."* In the course of their journey they, too, came to the brick rick, the ditch, the ridge

of dirt and the red lights on Walnut street. There they met, as said, the gray and brown mule and Parker face to face. When mules and rider approached and passed the three travelers, all on the same side of the ditch, the led mule, whether scared by the hole in the ground, the rick of brick or the ridge, is dark, shied from his fellow ("spread" himself) and presently his hind leg was mixed up with the shafts and wheel of the buggy. When the *status quo ante* was re-established both leg and wheel were found damaged. Subsequently a blacksmith offered to repair the damages to the wheel for, say, a dollar and a half. This sum defendant, though denying liability, was willing and offered to pay; but plaintiff's dander was up and he as buggy-owner demanded a new wheel worth five dollars, and sued.

In the justice court, defendant lost outright and appealed. In the circuit court, the same. The learned judges of the Court of Appeals could not agree (the *furor scribendi* being much in evidence and three learned opinions falling from their several pens) and sent the case here—and here it is.

My Brother GRAVES has well disposed of it on certain grounds, but, the theme being the Missouri mule and state pride calling for further exposition, the said *furor scribendi* has seized me—witness:

(a) It is argued that it was negligence to ride one mule and lead its fellow by hand. That they should be halter-yoked "neck and neck." Parker says he necked them in a way, but plaintiff takes issue on the fact. Allowing credit to plaintiff's evidence, two questions spring, *viz.*: First, is the neck-and-neck theory "mule law" in this jurisdiction? Second, if so, then was the absence of the neck-and-neck adjustment the proximate cause of the injury? We may let the first question be settled in some other mule case and pass to the second as more important. It will be observed that the neck and forequarters of the mule did not do the dam-

age. *Contra*, the hind quarters or "business end" of the mule were in fault. We take judicial notice of facts of nature. Hence, we know that haltering a mule neck-and-neck to another will not prevent his hind parts spreading. His neck might be on one line, but his hind legs and heels might be on another, a divergent one. True the mental concept relating to shying or spreading would naturally originate in the mule's head. But it must be allowed as a sound psychological proposition that haltering his head or neck can in nowise control the mule's thoughts or control the hinder parts affected by those thoughts. So much, I think, is clear and is due to be said of the Missouri mule, whose bones, in attestation of his activity and worth, lie bleaching from Shiloh to Spion Kop, from San Juan to Przemyśl (pronounced, I am told by a scholar, as it is spelled). It results that causal connection between the negligence in hand and the injury is broken and recovery cannot go on the neck-and-neck theory. This because it is plain under the distances disclosed by the evidence that the mule's hind legs could reach the buggy wheel in spite of a neck-and-neck attachment.

(b) The next question is a bit elusive, but seems lodged in the case. It runs thus: There being no evidence tending to show the mule was "wild and unruly" as charged, is such a mule *per se* a nuisance, a vicious animal, has he a heart devoid of social duty and fatally bent on mischief when led by a halter on the street of a town, and must his owner answer for his acts on that theory?

Attend to that view of it:

(1) There are sporadic instances of mules behaving badly. That one that Absalom rode and "went from under" him at a crisis in his fate, for instance. So it has been intimated in fireside precepts that the mule is *unexpected* in his heel action, and has other faults. In Spanish folk lore it is said: He who wants a mule without fault must walk. So, at the French

chimney-corner the adage runs: The mule long keeps a kick in reserve for his master. "The mule don't kick according to no rule," saith the American negro. His voice has been a matter of derision and there be those who put their tongue in their cheek when speaking of it. Witness the German proverb: Mules make a great fuss about their ancestors having been asses. And so on, and so on. But none of these things are factors in the instant case; for here there was no kicking and no braying standing in the relation of *causa causans* to the injury to the wheel.

Moreover, the rule of logic is that induction which proceeds by merely citing instances is a childish affair and, being without any certain principle of inference, it may be overthrown by contrary instances. Accordingly the faithfulness, the dependableness, the surefootedness, the endurance, the strength and the good sense of the mule, all matters of common knowledge, may be allowed to stand over against his faults and create either an equilibrium or a preponderance in the scales in his favor. He, then, as a domestic animal is entitled to the doctrine that if he become vicious, guilty knowledge (the *scienter*) must be brought home to his master, precisely as it must be on the dog or ox. The rule of the master's liability for acts of the ox is old. [Ex. 21:29.] That for the acts of the dog is put this way: The law allows the dog his first bite. Lord Cockburn's *dictum* covers the master's liability on a kindred phase of liability for sheep-killing, to-wit: Every dog is entitled to at least one worry. So with this mule. Absent proof of the bad habit of "spreading" when led and the *scienter*, liability did not spring from the mere fact his hind leg (he being scared) got over the wheel while he was led by a five-foot halter rope; for it must be held that a led mule is not a nuisance *per se*, unless he is to be condemned on that score out-and-out because of his ancestry and some law of heredity, some asinine rule, so to speak, a question we take next.

(2) Some care should be taken not to allow such scornful remarks as that "the mule has no pride of ancestry or hope of posterity" to press upon our judgment. He inherits his father's ears, but what of that? The ass's ears, presented by an angry Apollo, were an affliction to King Midas, but not to the mule. He is a hybrid, but that was man's invention centuries gone in some province of Asia Minor, and the fact is not chargeable to the mule. So, the slowness of the domestic ass does not descend as a trait to the Missouri mule. It is said that a thistle is a fat salad for an ass's mouth. Maybe it is also in a mule's, but be it so, surely his penchant for homely fare cannot so far condemn him that he does not stand *rectus in curia*. Moreover, if his sire stands in satire as an emblem of sleepy stupidity, yet that avails naught; for the authorities (on which I cannot put my finger at this moment) agree that the Missouri mule takes after his dam and not his sire in that regard. All asses are not four-footed, the adage saith, and yet to call a man an "ass" is quite a different thing than to call him "mullish" (*vide*, the lexicographers).

Furthermore, the very word jack-ass is a term of reproach everywhere, as in the literature of the law. Do we not all know that a certain phase of the law of negligence, the humanitarian rule, first announced, it has been said, in a donkey case (*Davies v. Mann*, 10 Mees. & Wels. 545) has been called, by those who deride it, the "jack-ass doctrine?" This on the doctrine of the adage: Call a dog a bad name and then hang him. But, on the other hand, to sum up fairly, it was an ass that saw the heavenly vision, even Balaam, the seer, could not see and first raised a voice against cruelty to animals. [Num. 22:23 et seq.] So, did not Sancho Panza by meditation gather the sparks of wisdom while ambling along on the back of one, that radiated in his wonderful judgments pronounced in his decision by the common-sense rule of knotty cases in

the Island of Barataria? Did not Samson use the jaw-bone of one effectually on a thousand Philistines? Is not his name imperishably preserved in that of the fifth proposition of the first book of Euclid—the *pons asinorum*? But we shall pursue the subject no farther. Enough has been said to show that the ass is not without some rights in the courts even on sentimental grounds; *ergo*, if his hybrid son, tracing his lineage as he does to the Jacks of Kentucky and Andalusia, inherits some of his traits he cannot be held bad *per se*. *Q. E. D.*

It is meet that a five-dollar case, having its tap root in anger (and possibly in liquor), should not drag its slow lengths through the courts for more than five years, even if it had earned the *sobriquet* of "the celebrated mule case."

The premises herein and in the opinion of Brother GRAVES all in mind, I concur.

CITY OF CARUTHERSVILLE, Appellant, v. J. D.
HUFFMAN and SARAH HUFFMAN.

Division One, December 2, 1914.

1. **BILL OF EXCEPTIONS: Record Proper: Not Commingled.** Where the abstract bears after the pleadings the statement that "the following entries and matters appear of record proper," followed by orders of court, including those relating to the bill of exceptions, and then by a heading, "Bill of Exceptions," in large, black-faced capitals, preceding such matter as is usually preserved in that form, it will not be held that matter of exceptions and of record proper have been commingled.
2. **LIMITATIONS: Streets.** Sec. 1886, R. S. 1909, providing that "nothing contained in any statute of limitation shall extend to any lands given, granted, sequestered or appropriated to any public . . . use," applies not simply to lands acquired by the public in fee, but to lands dedicated to a city for streets and alleys.

3. **PLAT: Outlines: Construction.** In construing plats dedicating property, the courts will give effect to the plain meaning and intent exhibited by their outlines as well as by their words.
4. ———: **Conveyance By Reference: Dedication.** Those to whom property is conveyed by reference to a plat which attempted to dedicate streets and alleys to the public, adopt the dedication by accepting the conveyance.
5. ———: **Defective: Dedication of Streets and Alleys: Accepted by City: Adverse Possession of Alley.** Where the dedication of streets and alleys to the public by a plat of city property was defective, in that there was no showing of a submission of the plat to the city council, the city by opening and improving streets indicated thereon accepted the dedication in full, and a property owner in the addition cannot acquire title to an abutting alley by adverse possession.

Appeal from Pemiscot Circuit Court.—*Hon. Henry C. Riley*, Judge.

REVERSED AND REMANDED.

Vance J. Higgs and *Everett Reeves* for appellant.

(1) The dedication was in substantial compliance with the statute and is a good statutory dedication. *Buschmann v. St. Louis*, 121 Mo. 523; *Price v. Breckenridge*, 77 Mo. 447; *Reid v. Board*, 73 Mo. 295; *Otterville v. Bente*, 240 Mo. 291. (2) (a) But if we concede that the plat was insufficient as a statutory dedication, it was good as a common-law dedication when accepted by the city by opening and improving the streets as platted. *Rose v. St. Charles*, 49 Mo. 509; *Heitz v. St. Louis*, 110 Mo. 618; *Naylor v. Harrisonville*, 207 Mo. 341; *Ragan v. McCoy*, 29 Mo. 356; *Hannibal v. Draper*, 15 Mo. 635; *Rector v. Hartt*, 8 Mo. 448; *Otterville v. Bente*, 240 Mo. 291. (b) The law is that the city by accepting, improving and using a street or streets or an alley or alleys as platted must be regarded as accepting the whole tract as platted, and not merely such portion as the city chose to open and improve. *Heitz v. St. Louis*, 110 Mo. 618; *Otterville v. Bente*, 240 Mo.

291. (3) The appellees are forever estopped and precluded from denying the sufficiency of the dedication in this case, because they purchased from the original dedicators said lots 5 and 6, abutting on the alley in controversy, and accepted a warranty deed therefor which particularly described the property as platted and dedicated. Dillon on Municipal Corporations says (sec. 1083): "While a mere survey of land, by the owner into lots, defining streets, squares, etc., will not, without a sale, amount to a dedication, yet a sale of lots with reference to such plat, or describing lots as bounded by streets, will, as between the grantor and grantee, amount to an immediate and irrevocable dedication of the streets, binding upon both vendor and vendee." In section 1084 the author says: "It has been held that when the owner of lands sells lots according to a plat or plan showing streets, alleys and other public ways thereon, the right which passes to the purchaser in the streets, shown on the plan is not the mere right that he may use the streets, but that all persons may use them." (4) (a) The Statute of Limitations does not run against the city in this case. R. S. 1909, sec. 1886; *California v. Bright*, 179 Mo. 441; *St. Louis v. Railroad*, 114 Mo. 13; *Otterville v. Bente*, 240 Mo. 291. (b) Ejectment may be maintained by the city to recover public streets or alleys. *California v. Howard*, 78 Mo. 88; *Elevator Co. v. Railroad*, 135 Mo. 353.

Arthur L. Oliver for respondents.

(1) Appellant's appeal in this case should be dismissed for the reason that it fails to comply with the rules of this court. No sufficient abstract of the record has been filed herein. While it is true the so-called abstract shows that a bill of exceptions was tendered and filed, there is nothing to show where the

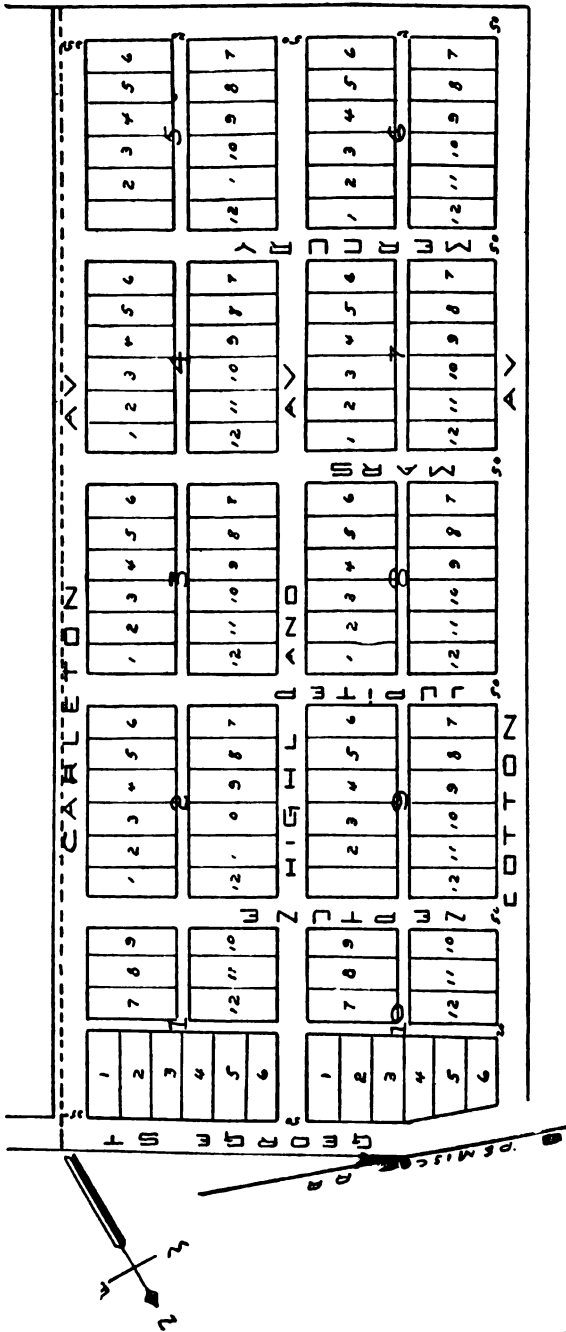
record proper ends or the so-called bill of exceptions begins. *Reno v. Fitz Jarrel*, 163 Mo. 413. (2) A common-law dedication is an implied dedication arising and operating by way of estoppel, and the public acquires merely the easement or right to use the land, while the fee remains in the owner. To constitute a common-law dedication there must be an acceptance on the part of the public by continuous, notorious and adverse use, or other similar acts under a claim of right in the public. Such were not the conditions here. The plaintiff, about the time that defendants fenced up the land in dispute, began to use and improve some of the streets mentioned in the plat. For thirteen long years its officers saw defendants peaceably and continuously in possession of this ground, erecting lasting and valuable improvements thereon and did nothing. Holding, at least, an easement in this strip of ground and not the fee, the city is now barred by the Statute of Limitations from maintaining this action. *St. Charles County v. Powell*, 22 Mo. 25; *Banson v. Madison Co.*, 204 Mo. 98; *Mississippi County v. Vowels*, 101 Mo. 228; *Callaway County v. Nolley*, 31 Mo. 398; *Chicago v. Middlebrook*, 143 Ill. 265; *Sims v. Frankfort*, 79 Ind. 446; *Reed v. Bingham*, 92 Ala. 339; *Driggs v. Phillips*, 103 N. Y. 77; *Yates v. Warrenton*, 84 Va. 337. (3) Appellant contends that Sec. 1886, R. S. 1909, exempts appellant from the ten-year Statute of Limitations. But the strip in question was never "given, granted, sequestered, or appropriated" to any public use, and therefore the above statute does not apply. At best, the entire "Ward Addition" only became a part of the city by a common-law dedication whereby the right of use was acquired by the city, while the fee remained in Wm. A. Ward, and his two sisters. Certainly they are barred by defendants' possession of more than thirteen years. Then what superior rights has the appellant, who never accepted the attempted dedication; who never exercised the right of user over the strip

in dispute at any time, nor over any part of the addition for more than ten years before defendants' possession began?

BROWN, C.—Ejectment to recover a tract of land in the city of Caruthersville in said county, twenty feet wide and one hundred feet long, on the ground that it is dedicated to public use as an alley. A jury was waived.

There was no substantial dispute as to the facts. While it is not clearly shown in the evidence it seems to be assumed in argument that on March 22, 1895, the land included in "Ward's First Addition of Caruthersville" was within the city limits. On that day the plat was filed, consisting of two tiers of blocks extending in a northerly and southerly direction, five blocks in each tier. On the east side was a street named Carleton avenue; between the two tiers of blocks was Highland avenue, and on the west, Cotton avenue. From north to south the cross streets were named George, Neptune, Jupiter, Mars, Mercury, and an unnamed street along the south end. Block five occupies the southeast corner of the plat, with its two tiers of lots, each lot having fifty feet frontage and a depth of 140 feet. Lots one to six inclusive, numbered from north to south, fronted on Carleton avenue, while lots seven to twelve inclusive, numbered from south to north, fronted on Highland avenue. The alley in question extends through the middle of the block from Mercury street on the north to the unnamed street on the south, in the rear of the lots, and is twenty feet wide. A similar alley extends through each block except the north pair, the north six lots of which front north on George street with an alley extending east and west in their rear. All the other blocks are identical.

On the date mentioned William A. Ward and his three sisters, with the husbands of two of them who were married women, filed the plat above described in



WARD'S FIRST ADDITION OF CARUTHERSVILLE, MO.

Scale, 200 feet equals 1 inch

Caruthersville v. Huffman.

the recorder's office, duly signed and acknowledged, with the following certificate: "We the undersigned hereby declare the above to be a true and correct plat of Ward's First Addition to Caruthersville, Mo., and forever dedicate to the public the streets therein named." The approval of the common council was not indorsed on the plat, nor was there any evidence of such approval by ordinance. On March 15, 1896, they conveyed lots five, six, and seven, of block five, to the defendant Sarah E. Huffman, wife of her co-defendant, by that description. In September following they built a residence on lots five and six, fronting on Carleton avenue, and fenced the three lots, including in the enclosure the land in controversy, being the entire 100 feet of the alley lying in the rear of the two lots on which they built. This enclosure remained up to the time of the trial. Building proceeded in the addition so that when this suit was tried in 1909 it was "thickly settled." The unnamed street south of defendants' premises was opened and traveled in 1897. All the other streets on the plat were opened and improved, by paved or plank sidewalks on each side and by grading, and telephone and electric light poles had been maintained on all of them for a number of years. Carleton avenue had been opened and traveled at the time defendants built their enclosure. The north 200 feet of the alley in question in block five has been open and used several years. At the trial Mr. Huffman was sworn as a witness for the plaintiff and stated on oath that the defendants had no other paper title to the premises than the deed above mentioned, and that he claimed title to the land in controversy by adverse possession for more than thirteen years. The judgment was for the defendants.

I. The preliminary point is made by the respondent that the appeal should be dismissed for the rea-

Bill of Exceptions. son that "no sufficient abstract of the record has been filed." The only specification is that "there is nothing to show where the record proper ends and the bill of exceptions begins."

Examining the abstract we find at the end of the pleadings the statement: "The following entries and matters appear of record proper." Then follows a statement of orders of the court up to and including an order granting time to file bill of exceptions, and an order in term filing the bill within the time so granted. Then follows a big black faced capital line, as follows, "BILL OF EXCEPTIONS," followed by such matter as is usually preserved in that form, and finally by the usual and time honored attestation and signature of the judge with his official title. Having no difficulty in locating the dividing line between these two important portions of the record, we feel at liberty to proceed to the real question upon which the parties seem to have differed at the trial.

II. This question is, in general terms, whether this land has been given, granted, sequestered or appropriated to public use within the meaning of that expression as used in section 1886, Revised Statutes 1909, which provides that "nothing contained in any Statute of Limitations shall extend to any lands given, granted, sequestered or appropriated to any public . . . use," so as to give the plaintiff city a possessory title which it may enforce in ejectment, and to prevent the acquisition of that title by the defendants by adverse possession, under the circumstances conclusively shown in this record.

It is intimated by the defendants in their brief that this provision applies only to lands acquired by the public *in fee*, although they do not attempt to support that position otherwise than by naked assertion,

and we can see no reason upon which such a distinction can stand. The city is given "exclusive control over all streets, alleys, avenues, and public highways within the limits of such city" (R. S. 1909, sec. 9400), and it is plain that it cannot exercise this control without possession whether the title be an easement or a fee. The action of ejectment is a purely possessory one and it lies wherever the right to the possession of lands exists, and possession is withheld. So with the provision of section 1886 of the same revision exempting lands appropriated to public use from the operation of the statutes of limitation. Its words, as well as its reasons for being, apply equally to all interests in land appropriated to public use susceptible of adverse possession. The question is, has this land been dedicated to the public as a street or alley? If so it is immaterial whether such dedication be of the nominal fee or a simple easement.

In construing plats of this character we must give effect to the plain meaning and intent they exhibit by their outlines as well as by their words.

Construing
Plat: Outlines. [Brown v. Carthage, 128 Mo. 13, 23; Buschmann v. St. Louis, 121 Mo. 523,

536.] This plat expressed in its outlines more certainly than it could have expressed in words, what portions were to be sold or used as lots and what portions were intended as streets and alleys to serve them. It conformed exactly to the provisions of the statute in those respects, but did not conform to the provision requiring it to be submitted to the common council of the city, and its approval by ordinance to be indorsed on it before recording; and in this respect it did not constitute such a dedication of the streets and alleys which were shown on it as was required by the statute, and which carries with it the acceptance of the city. After the filing of the plat the owners sold the three lots at the south end of block five to the defend-

ant Mrs. Huffman, conveying them by a deed which described them only by numbers which they bore on the plat, and which could not operate without the assistance of the latter to identify the description. The streets and alleys shown on the plat were thus appropriated to the public uses thereon indicated so far as it could be done by a common-law dedication in which the defendants, or at least the wife, joined with the original owners. "When an incomplete or defective statutory dedication is *accepted by the public*, or when rights are acquired under such dedication by *third persons*, such acquisitions will operate in favor of the public and of such acquirers respectively," and "the sale and conveyance of the lots in the town according to its plan carry with them a grant or covenant that the streets indicated on the plan shall be forever open to the use of the public." [Heitz v. St. Louis, 110 Mo. 618, 624; Buschmann v. St. Louis, 121 Mo. 523, 536.] The city accepted the dedication by opening to public travel Carleton avenue, on which the defendants' lots fronted one hundred feet, and the unnamed street on the south, upon which they abutted two hundred and eighty feet, and has continued ever since to improve and maintain them. The defendants showed their appreciation of this by fencing up the alley, for which they apparently had no use, and to which they neither had nor claimed any title other than that which inheres in the abutting proprietor, for the purpose as they now say, of acquiring title to it by adverse possession. In this the law affords them no assistance. When the defendants received the deed to their lots as described in the plat, they approved and adopted it; when the city adopted it and opened and improved the streets upon which the lots abutted, it accepted the dedication of the alley as well (Heitz v. St. Louis, supra, l. c. 625); and there-

**Dedication:
Conveyance
by Reference.**

**City Accepting
Dedication:
Adverse
Possession
of Alley.**

after, whether fenced or unfenced, it was held subject to the right of the city to take it at any time it should see fit to exercise its statutory dominion over it. [Robinson v. Korn, 250 Mo. 663, 673; Otterville v. Bente, 240 Mo. 291.]

The judgment of the circuit court is reversed and the cause remanded for further proceedings. *Blair, C.*, concurs.

PER CURIAM.—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All the judges concur.

JOHN W. BOWLES, Iowa Guardian of MAGGIE V. WILSON, an Insane Person, Appellant, v. HARRY TROLL, Public Administrator and Missouri Guardian of Said MAGGIE V. WILSON.

Division One, December 2, 1914.

1. **APPELLATE JURISDICTION: Errors Corrected Sua Sponte: Retransfer After Motion Overruled.** The Supreme Court is a court of errors, and the power to correct its own errors is self-evidently an integral part and parcel of its powers to correct the errors of other courts, and the duty to correct them in the same case at the first opportunity is always present where a ruling is sharply wrong and unsettles correct practice of the law. And especially is this true of so vital a question as jurisdiction—a question always obtruding itself *sua sponte* in any case in any court. So that where a case has been transferred to the Supreme Court by the Court of Appeals, on the ground that the amount in dispute exceeds \$7500, and a motion to retransfer on the ground of lack of jurisdiction has been overruled, although the court could undoubtedly take the question as foreclosed once for all, yet if upon further examination it appears that the motion was improvidently overruled, the case will be retransferred.
2. ———: **Contest Between Guardians: Amount in Dispute.** The Supreme Court does not have appellate jurisdiction of an

appeal from a judgment of a court of equity decreeing that an Iowa guardian of an insane person whose domicile is in that State is not entitled to have the administration of the Missouri guardian closed and all the assets turned over to him, where the value of her estate in this State amounts to only \$10,000. Neither guardian owns the fund in his own right; both are trustees, and she is the beneficial owner; the value of the right to the custody of the fund, in either, depends upon the perquisites, emoluments and fees of his trusteeship falling to him in administering the estate, and the value of those things is "the amount in dispute" between them, and that value cannot by any legal estimate amount to \$7500. where the assets are worth only \$10,000.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow*, Judge.

TRANSFERRED TO ST. LOUIS COURT OF APPEALS.

Warren D. Isenberg and *A. V. Proudfoot* for appellant.

Marshall & Henderson for respondent.

LAMM, J.—Plaintiff sued in equity in the St. Louis Circuit Court. The object and general nature of his bill was to procure a decree in his favor, as Iowa guardian, requiring Troll, the Missouri guardian, to make a final settlement of his accounts, and pay over the balance in his hands, that is, transfer the estate, and for general relief—the bill counting on the theory that the ward resided in Iowa; was adjudged insane and confined in an asylum there; that plaintiff is the primary or domiciliary guardian, and defendant the ancillary guardian; that the purposes of the Missouri guardianship have been fully subserved and to continue it would subject the estate of the ward to the wasting burden of double costs and expense.

The case was tried in a notably unconventional way, on an agreed statement of facts, in substance as follows:

Bowles v. Troll.

Mrs. Wilson is an insane person domiciled for twenty years in Iowa, adjudged insane by a court of competent jurisdiction in Warren county in that State in 1897, and since then confined in an Iowa hospital, the Clarinda Insane Asylum; that in 1897 Bowles, plaintiff, was duly appointed her guardian in Iowa by a named court of competent jurisdiction and has ever since acted as such; that in 1906 defendant Troll, public administrator of St. Louis, was duly appointed guardian in Missouri, and is now acting as such; that plaintiff as guardian is under a \$20,000 bond in the proper court in Warren county, Iowa, which bond is now in full force and effect; that said court authorized plaintiff by its due orders to collect by proper proceeding the estate of said ward in the hands of defendant; that the ward is a widow with three children, one a minor about fourteen years of age; that she has no estate in Iowa except a widow's pension, a small one, received from the United States government; that plaintiff is a relative of said ward by marriage, and a fit and suitable person to be guardian at the domicile of the ward; that plaintiff at the time of defendant's appointment as guardian, being a non-resident of Missouri, could not be appointed guardian in this State; that defendant's appointment as such was for the purpose of collecting funds of the ward's estate in Missouri; that Troll as such guardian has in his hands about \$10,000; that the ward is not indebted, so far as known, to any person in Missouri; that two years have passed since Troll's appointment; that notice of his appointment was duly given as required by law; and that all claims proved against his ward's estate in Missouri have been paid.

On such agreed facts, the court found for defendant and plaintiff appealed on due steps to the St. Louis Court of Appeals. That court, on its own motion, transferred the case to this court on the theory "the amount in dispute" exceeds \$7500 exclusive of costs,

basing its ruling on the doctrine of Gartside v. Gartside, 42 Mo. App. 513, a case transferred here and of which we retained jurisdiction. [113 Mo. 348.] Subsequently, it seems, a motion was filed in this court to remand the instant case to the St. Louis Court of Appeals on the grounds of our lack of jurisdiction. This motion was overruled, we now think improvidently. Undoubtedly we could take the question as foreclosed once for all by our ruling on the motion and proceed to decide the cause on its merits. But, on the other hand, this being a court of errors, the power to correct our own is self-evidently an integral part and parcel of the power to correct the errors of other courts, and the duty to correct them in the same case at the first opportunity is always present where a ruling is sharply wrong and unsettles correct practice, or the law. [Star Bottling Co. v. Exposition Co., 240 Mo. l. c. 643-4.] Especially is this so on so vital a question as jurisdiction—a question always obtruding itself, *sua sponte*, in any case in any court at any time above or below.

That our ruling on the motion to retransfer was improvidently made will appear from the following premises: In the case at bar neither plaintiff nor defendant claim to own the fund in their own right. *Contra*, both plaintiff and defendant concede it belongs to and constitutes practically the *corpus* of the estate of their unfortunate ward. Both of them, therefore, are but trustees. She is the beneficiary and the dispute is not over *her* right to the fund, but it is over their respective rights to the custody of it while it is being used under the supervision of the probate court for its true beneficial owner. So, plaintiff does not ask a money judgment against defendant to be enforced by *fi. fa.* He invokes merely the power of a chancellor to do the following thing, to-wit, to coerce a final settlement in the proper probate court of the ancillary guardianship with the ultimate view and pur-

pose of an order of transfer of what then remains of the fund from the ancillary guardian to the domiciliary guardian at the place of residence of the ward in order to throw off the burden of expense, waste and inconvenience of two administrations. Hence the real justiciable dispute is over the power of a court of equity to make that order either by virtue of its superintending control over the probate court, or under a recognized and ancient head of chancery jurisdiction over the estates of insane persons. Necessarily involved, though incidental to the main question thus outlined, is the value of the right in defendant to the custody of the fund, and this in turn springs from the prerequisites, emoluments and fees of his trusteeship falling to him in administering the estate. These, moreover, fluctuate with the amount of the trust fund, with the duration of the trust, etc. Now, in the Gartside case, *supra*, the trust estate ran up into the hundreds of thousands of dollars and the trusteeship was for life. Judge ROMBAUER, speaking in that case, laid the foundation for his judgment on the postulate that where jurisdiction hinges on the value of the matter in dispute such value must be estimated in money; on the further postulate that jurisdiction does not turn entirely on whether the immediate object of the suit was for the recovery of a sum of money, but is to be got at on a survey of the whole record—for instance: In a suit to establish the right to an office the aggregate of the salary for the unexpired term claimed by the adverse party is the money value of the matter in dispute and is determinative of jurisdiction. So, in an injunction suit, the money value to plaintiff of the object sought to be gained by the bill is the money value of the matter in dispute and determinative of jurisdiction. It was on such postulates, and not otherwise, the Gartside case was resolved on the question of jurisdiction as appears from an excerpt which is the sum of the matter, thus:

“In the case at bar the record fails to show what value, if any, attaches to the defendant’s position as trustee, but it does appear that the duration of that office, if it may be so called, is for life, and invests him, as far as these plaintiffs are concerned, with the partial control of property of the value of two hundred thousand dollars or more, of which he is to be deprived by this proceeding, and we are not prepared to say, unconditionally, that this is a case where the amount in dispute does not exceed twenty-five hundred dollars.” [42 Mo. App. 1. c. 515.]

In *Gast Bank Note & L. Co. v. Fennimore Assn.*, 147 Mo. 557, an injunction suit in which there was no allegation in the bill to determine the value in money of relief to plaintiff, it was ruled we had no jurisdiction. This ruling was put in part on a pronouncement made by the Court of Appeals in *Brick Co. v. St. Louis Smelting & Ref. Co.*, 48 Mo. App. 635, reading:

“When the object of the suit is not to obtain a money judgment, but other relief [in this case an injunction], the amount involved must be determined by the value in money of the relief to the plaintiff, or of the loss to the defendant, should the relief be granted, or *vice versa*, should the relief be denied. If either is necessarily in excess of the sum within the appellate jurisdiction of this court, then the Supreme Court has exclusive cognizance of the appeal.”

To like effect is *Clothing Co. v. Watson*, 168 Mo. 1. c. 143; and in a very late *quo warranto* case, *State ex rel. Union Elec. Light & Power Co. v. Reynolds et al.*, Judges, 256 Mo. 710, the learning on the point was reviewed *in extenso* by our Brother GRAVES in Banc. In that case we drew to ourselves jurisdiction because the value of the right necessarily involved, estimated in money, self-evidently gave us jurisdiction. We will not swell this opinion by quoting from so late a case. The student with a prying mind may consult it with profit. We dismiss it with the observation that the

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precedents there marshaled and the reasoning employed point unerringly to the conclusion that we are without jurisdiction in this case, on the question in hand, unless we are prepared to say the money value of the right of the Missouri guardian to hold the *corpus* of a \$10,000 estate in his hands and administer it (thereby enjoying the appurtenant and expectant fees, perquisites and emoluments of the trusteeship), is over \$7500. There is a case, not in our reports, in which no opinion was rendered because it rode off on a motion to retransfer, to-wit, Horton et al. v. Troll, Public Administrator, in Charge of the Estate of Dunham. In that case, although the *corpus* of the estate itself gave us jurisdiction if we took that particular amount as decisive, we retransferred it to the St. Louis Court of Appeals because the money value to the administrator of the right to administer was within its jurisdiction.

Turning, now, to the present record, the money value of the right to administer Mrs. Wilson's estate, which is the only thing Troll stands to lose or win, hence is the "amount in dispute," in a jurisdictional sense, certainly cannot equal \$7500; unless, more's the pity (to borrow the wry conceit of a barrister in another case at our bar) we take the letters of guardianship as in the nature of a warranty deed to the whole or the lion's share of the estate of the ward—a thing we are not willing to do, nor is it asked at our hands.

This court has neither a disposition to yearn after jurisdiction and give teeth to such yearning by reaching out and grasping it on unsubstantial grounds, nor does it shirk a jurisdiction rightfully belonging here. As final arbiter it takes and gives ungrudgingly as the facts warrant and the law directs; and in this case we are of opinion we have no jurisdiction unless other questions besides the amount in dispute give it to us. We have searched the record with an eye to that fact

and find no question the Court of Appeals cannot jurisdictionally deal with.

The premises all in mind, the cause is retransferred to the St. Louis Court of Appeals. It is so ordered. All concur.

W. W. BROYLES v. ENO V. EVERSMEYER,
Appellant.

Division One, December 2, 1914.

1. **AMENDING PETITION: Changing Cause of Action: Mistake in Description of Land.** Where the original petition in ejectment described the northeast fractional quarter of a section 27, it is not error to permit the plaintiff to file an amended petition describing the land sued for as the northeast fractional quarter of section 28, and after a motion to strike out the amended petition, on the ground that it is the substitution of a new cause of action and not an amendment of the cause of action stated in the original petition, is overruled and defendant stands mute, to render judgment *nil dicit* for plaintiff on said amended petition for the land described therein.
2. ———: ———: **Statute Authorizing Correction of Mistake.** Sec. 1848, R. S. 1909, declaring that the court, at any time before final judgment, in furtherance of justice, and on such terms as may be proper, may amend any pleading by correcting "a mistake in any other respect," authorizes the court to permit plaintiff in ejectment to file an amended petition changing the description of the land sued for; and a record entry showing that "leave is granted plaintiff to file an amended petition correcting error in description" is a finding by the court that a mistake was made in the description of the land in the original petition, and those things appearing it will not be held that the amended petition was the substitution of a new and different cause of action.

Appeal from Lincoln Circuit Court.—*Hon. James D. Barnett, Judge.*

AFFIRMED.

Charles Martin for appellant.

(1) The two tests adopted in this State to determine whether a second petition is an amendment or the substitution of a new cause of action are: first, that the same evidence will support both petitions; second, that the same measure of damages or recovery will apply to both petitions. *Scovill v. Glasner*, 79 Mo. 449; *Walker v. Railroad*, 193 Mo. 477; *Ross v. Land Co.*, 162 Mo. 317. Another test which the courts have generally adopted is to inquire whether a recovery on the original petition would be a bar to a recovery under the second or amended petition. *Bick v. Vaughn*, 140 Mo. App. 603; *Davis v. Railroad*, 110 N. Y. 646; 1 Ency. Pl. & Pr. 556. (2) An application of these tests to the two petitions will demonstrate that the second petition is but the substitution of a new cause of action and not an amendment of the original petition. The evidence which would show title, possession and right of possession of the northeast fractional quarter of section 27 would in no manner show or tend to show title, possession and right of possession to the northeast fractional quarter of section 28. The character of the evidence to support both petitions would not be the same. *Burnham v. Tillery*, 8 Mo. App. 458; *Clothing Co. v. Railroad*, 71 Mo. App. 247. (3) The measure of damages or recovery would not be the same. The rule is that the identity of the matter upon which the action is founded must be preserved in the second petition and the judgment rendered. *Walker v. Railroad*, 193 Mo. 477; *Stewart v. Jackson*, 91 Mo. App. 647; 1 Ency. Pl. & Pr. 559. (4) In construing different complaints or petitions to ascertain whether a new cause of action is injected into the second complaint the courts cannot inquire what was the private intention of the pleader but can only look at the petitions to get that intention. *Gregory v. Railroad*, 20 Mo. App. 448; *Sturgis v. Botts*,

24 Mo. App. 284. The question in this case seems to be settled in the case of *Bricken v. Cross*, 163 Mo. 449, a case in which plaintiff after the case had been once reversed, amended his petition so as to cover lands not described in his original petition. The defendant waived his right to object to such amendment by answering the amended petition. The question in the case was whether the Statute of Limitations would run up to the time of filing the original petition or up to the time of filing the amended petition, and the court held that it would run up to the time of filing the amended petition because that was the introduction of a new cause of action. *Slater v. Nason*, 15 Pick. 345; *Robbins v. Harris*, 96 N. C. 557; *Cilley v. Railroad*, 77 Atl. 776; *Robinson v. Miller*, 37 Mo. 312; *Wolf v. Wolf*, 158 Pa. St. 621. (5) The liberality in allowing amendments does not extend to such amendments as change the nature and scope of the cause of action or the substitution of a different cause of action in place of the one attempted to be set up in the original pleadings. *Pomeroi's Code Pleadings*, see 457; 1 *Ency. Pl. & Pr.*, p. 472; *Hepburn, Code Pleadings*, 306; *Laughlin v. Leigh*, 226 Mo. 620. (6) The amended petition changes the cause of action and substitutes a different one for that stated in the original petition. *Bricken v. Cross*, 163 Mo. 449; *Robinson v. Miller*, 37 Me. 312; *Wyman v. Kilgore*, 47 Me. 184; *Robbins v. Harris*, 96 N. C. 557; *Nickerson v. Bradbury*, 88 Me. 593; *Wolf v. Wolf*, 158 Pa. St. 621; *In re Wilhelm Appeal*, 79 Pa. St. 120; *Slater v. Mason*, 15 Pick. 345; *Cilley v. Railroad*, 77 Atl. 776. The only case in this State which gives any support to the amendment allowed in this case is *Wright v. Groom*, 246 Mo. 158, and while that case was correctly decided upon the facts, it does not militate against our contention in this case. The land sought to be recovered in that case was a narrow strip along the dividing line of sections 15 and 22. A former survey of the land had been made and the de-

scription in plaintiff's original petition followed this survey, locating the land sued for in section 15. During the progress of the case and on the defendant's motion the court appointed other surveyors to resurvey the land, who located the east section corner on the line between the two sections further north than the first survey had located it, thus placing the land sued for in section 22 instead of section 15. The amendment asked and allowed was made to correspond to the last survey. The plaintiff's title was by limitation. The land was the same. "In other words (says the court in that case) the actual land, the real thing, the subject-matter of the suit, was the same under each petition, so the ouster complained of was the same and for aught appearing here the muniments of title would be the same." Thus we have in that case the identity of the subject-matter of the original petition carried into and made the subject-matter of the amended petition and necessarily, the subject-matter being the same in both the original and amended petitions, the same evidence, the same measure of damages or recovery and all the other tests by which the right to amend are judged will give authority for the amendment in that case. But while that case was correctly decided upon the facts as stated by the court the opinion goes further than was necessary and asserts the proposition that an amendment changing the subject-matter of the suit substituting another and different tract of land for the tract originally sued for, was allowable. We submit that our statute is not broad enough to support this proposition. Amendments are not allowed which change substantially the claim or defense. Sec. 1848, R. S. 1909.

R. H. Norton and Avery, Young & Killam for respondent.

The only question at issue between the parties is as to the right of the lower court to permit the plain-

tiff to amend his petition by substituting section 28 for section 27. The authorities fully justified the lower court in permitting the amendment and hearing the cause and rendering judgment on the amended petition. *Callaghan v. McMahan*, 33 Mo. 111; *Sage v. Tucker*, 51 Mo. App. 336; *Timber & Iron Co. v. Cooperaage Co.*, 112 Mo. 383; *Cooper v. Granberry*, 33 Miss. 117; *Heilbron v. Heinlen*, 72 Cal. 376; *Gillman v. Cate*, 56 N. H. 160; *Leeds v. Lockwood*, 84 Pa. St. 70; *Blanchard v. Dorman*, 236 Mo. 443; *Wright v. Groom*, 246 Mo. 158. The case last cited is on all-fours with the case at bar.

GRAVES, J.—This case involves but a single question of law. Appellant has made a succinct statement of the case in the following taken from the brief:

“The plaintiff commenced this suit in ejectment for the northeast fractional quarter of section 27, township 50, range 2 west, in Lincoln county, September 16, 1908. To this petition defendant filed a general denial, October 12, 1908. At the March term, 1909, the plaintiff filed his amended petition in which he asked recovery of possession of the northeast fractional quarter of section 28, township 50, range 2 west. On the same day, March 22, 1909, that plaintiff’s amended petition was filed, the defendant filed his motion to strike out plaintiff’s amended petition for the reason that it was the substitution of a new cause of action and not an amendment of the cause of action stated in the original petition, and for various other reasons. This motion was by the court overruled and exceptions taken and preserved and filed at the same terms of court. The plaintiff took no further steps in the case until March term, 1911, and then on the 28th day of March, 1911, took judgment against defendant by default. On March 31, 1911, the defendant filed his motion to vacate and set aside the judgment and in arrest of judg-

ment. These motions were overruled and exceptions taken and filed.

“The question in the case is: Was the second or so-called amended petition an amendment of the original cause of action or the substitution of a new cause of action. There was no waiver or appearance by defendant to the second petition. Can a plaintiff sue for one tract of land and by amendment recover another by default without appearance by defendant?”

That the last expressions of this court are adverse to the contention of the defendant is conceded by his able counsel. He argues the differentiation of those cases in the first place, and lastly that the broad language used is not a correct enunciation

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of the law. He contends that there is the statement of an entire new cause of action when it is apparent from the two petitions, i. e., the original and the amended,

that (1) the subject-matter in dispute is different, (2) that different evidence would be required to support the cases stated in the two respective actions, (3) that the measure of damage would be different, (4) that the recovery under one petition would not be a bar to a recovery under the other, and (5) that the same defense would not apply equally well to both petitions.

Generally speaking these are the tests applied in determining whether there has been such a departure as to make the amended petition state a different cause of action. However, what we have said upon the subject has been with reference to our statute upon amendments. Section 1848, Revised Statutes 1909, reads:

“The court may, at any time before final judgment, in furtherance of justice, and on such terms as may be proper, amend any record, pleading, process, entry, return or other proceedings, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to

the case, or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved."

If in the record before us the reason of the court for permitting the amendment did not appear, the court would be presumed to have been guided by the statutory rule in permitting the amendment. This statute says the court may amend a pleading at any time before final judgment "by correcting a mistake in the name of a party, or a *mistake in any other respect*." In permitting this amended petition to stand it could well be concluded that the trial court was convinced that the section number as stated in the original petition was a mere mistake, and such as often happens in such petitions. A correction of this mistake, if it was shown to the court to have been a mistake, is one which would, in our judgment, fall fairly within the meaning of the clause of the statute with reference to "a mistake in any other respect."

But in the case at bar we are not left in the dark as to the reason of the trial court for permitting the amendment. The record *nisi* reads:

"Now at this day come the parties herein by their respective attorneys, and leave is granted plaintiff to file during this day an amended petition correcting error in description, and said amended petition is now filed."

This amounts to a finding of the court that there was a mistake made in the original petition so far as the description of the land was concerned, and plaintiff was given leave to correct the same. Nor is this a harsh construction of the statute, because if the defendant is placed at any disadvantage by reason of the amendment, such amendment, under the statute, must be granted upon terms. In this case the defendant sought no terms, but stood boldly upon his conception of the law. His boldness may prove his undoing, but

if so, the undoing has been one wrought by his own hands.

This is the view of the statute taken by LAMM, J., in the case of *Wright v. Groom*, 246 Mo. 158, and is likewise the view previously taken by this court in the other Missouri cases cited by Judge LAMM. Whether the language used by the court in *Wright v. Groom*, *supra*, was strictly called for by the facts of that case, is immaterial, if such language announces good doctrine, and we think it does. Under the opinion in that case as well as the other cases therein cited, this judgment should be affirmed. The statute quoted is broad enough to cover just what was done in this case. Let the judgment be affirmed. All concur.

GENEVIEVE JODD, Appellant, v. LOUIS
MEHRTENS.

Division One, December 2, 1914.

LIMITATIONS: Dower: Thirty-Year Statute. A widow who claims dower in land which belonged to her husband during his lifetime cannot recover in an action for the admeasurement of dower, if the land has been in the lawful possession of those who bought at a foreclosure sale under a deed of trust signed by her and her husband and of those who claim under them, for thirty-one consecutive years before her suit was instituted, and during all that time neither she nor any one for her has paid any taxes, and if the title emanated from the government more than ten years before the entry by lawful possession of any person holding the premises.

Appeal from St. Louis City Circuit Court.—*Hon. C. C. Allen*, Judge.

AFFIRMED.

H. K. Bunch and *E. C. Dodge* for appellant.

(1) The trial court found for the defendant not only against the weight of the evidence, but in direct opposition to all of the evidence in the cause, and the court therefore erred in overruling plaintiff's motion for a new trial. *Doering v. Saum*, 56 Mo. 480; *Ittner v. Hughes*, 133 Mo. 680. Dower is not within the Statute of Limitations, unless made so expressly. *Dyer v. Witler*, 89 Mo. 95. The law existing at the time of marriage (1848) and not at the time of its dissolution (1878) determines the marital rights of the parties. *Riddick v. Walsh*, 15 Mo. 519. Dower is a right in law fixed from the moment marriage and seizin concur and becomes a title paramount to that of any person claiming under the husband by subsequent act. *Baker v. Railroad*, 122 Mo. 396. The Statute of Limitations does not commence to run against a widow until dower has been assigned, nor is staleness of demand any defense to an action for admeasurement of dower. *Johns v. Fenton*, 88 Mo. 67; *Williams v. Courtney*, 77 Mo. 587. The act limiting actions for the recovery of real estate, February 4, 1817, and the same act, R. S. 1855, p. 1045, does not include the limitations of suits for dower. *Littleton v. Patterson*, 32 Mo. 357. Where there is a change in the law after the husband's alienation, the widow's dower in respect to the aliened lands is governed by the law as it existed at the time of the alienation. *Kennerly v. Ins. Co.*, 11 Mo. 204. Appellant cites the case of *Dyer v. Witler*, 89 Mo. 95, as supporting the proposition that dower is not within the Statute of Limitations unless made so expressly. The opinion in this case was rendered by the Supreme Court at the April term, 1886, but the Legislature enacted R. S. 1889, sec. 4558, now Sec. 391, R. S. 1909, and the Act of 1887 was so amended as to require the action for admeasurement of dower to be brought within ten years after the death of the husband. Appellant contends that the above statutes are void and invalid as to this appellant. The concrete question in this

case is, does the Act of 1887 (Laws 1887, p. 177), bar the widow's right of dower ten years after the death of the husband? Appellant contends that said act and all decisions of our appellate courts sustaining said act, are void and invalid as to appellant's right of dower, because said act is prospective and could not be retroactive. The Constitution of the United States forbids and prohibits any retroactive acts. Therefore we contend that the Act of 1887 was and is prospective, and the appellant's dower should be sustained.

A. & J. F. Lee and *James A. Waechter* for respondent.

(1) Appellant relinquished her dower interest by the execution and acknowledgment of the deed of trust of May 1, 1876, in favor of Mary E. Fleming's trustees. *Barker v. Circle*, 60 Mo. 263; *Sharp v. McPike*, 62 Mo. 302; 1 R. S. 1872, secs. 2, 7, 9 and 14, pp. 273-4-5; *Ellis v. Kyger*, 90 Mo. 606; *De Bar v. Priest*, 60 Mo. App. 536; *Genoway v. Maize*, 163 Mo. 232. (2) Appellant's right to dower, if any, barred by the ten-year Statute of Limitations. Laws 1887, p. 177; Sec. 391, R. S. 1909; *Robinson v. Ware*, 94 Mo. 678; *Beard v. Hale*, 95 Mo. 18; *Farris v. Coleman*, 103 Mo. 366; *Long v. K. C. Stockyards*, 107 Mo. 304; *Null v. Howell*, 111 Mo. 277; *Brewing Co. v. Payne*, 197 Mo. 431; *Chouteau v. Harvey*, 36 Fed. 541; *Winters v. De Turk*, 7 L. R. A. 659; *Tiedeman on Real Property* (1906 Ed.), p. 112; *Harrison v. McReynolds*, 183 Mo. 533; *Phillips v. Hardenberg*, 181 Mo. 463. (3) Appellant's right to dower, if any existed, is barred by adverse possession. *Beard v. Hale*, 95 Mo. 16; *Robinson v. Ware*, 94 Mo. 678; *Null v. Howell*, 111 Mo. 273; *Long v. Stockyards*, 107 Mo. 304; *Robinson v. Allison*, 192 Mo. 366; *Stone v. Perkins*, 217 Mo. 586; *Hendricks v. Musgrave*, 183 Mo. 311; *Myers v. Schuckmann*, 182 Mo. 159; *Fugate v. Pierce*, 49 Mo. 441; *Franklin v. Cunningham*, 187 Mo.

196. (4) Appellant, if not already barred by the ten-year Statute of Limitations, adverse possession, or lapse of time, is barred under the thirty-year Statute of Limitations. Sec. 1884, R. S. 1909; Requa v. Graham, 57 L. R. A. 641; De Hatre v. Edmunds, 200 Mo. 275; Crain v. Petermann, 200 Mo. 299; Campbell v. Greer, 209 Mo. 216; Dunningham v. Hudson, 217 Mo. 101; Collins v. Pease, 146 Mo. 135.

STATEMENT.

This is an action for an alleged deforcement of dower. It was begun on October 28, 1910, in the circuit court of the city of St. Louis. The plaintiff (who has died since the appeal taken herein) was the wife of Michael Jodd, Sr. She alleged the death of her husband on the — day of September, 1878, and his seizure at the date of his death of two acres of ground in the city of St. Louis, and State of Missouri. The petition recites the names of the children and heirs of the deceased, who survived him, and alleges that plaintiff, upon the death of her husband, became entitled to dower in the land described in the petition, and that she had never at any time relinquished her right, nor received any equivalent therefor. That the defendant, Louis Mehrtens, entered into said premises and wrongfully deforced plaintiff of her dower right therein on the — day of May, 1910. The petition prayed for damages and monthly rents, and for an admeasurement in said land if that could be done. Otherwise, for monthly rents and profits, and for general relief. The answer admitted the possession of the defendant as a tenant, denied that he held under the plaintiff, or any of the heirs mentioned in her petition, denied that plaintiff had not relinquished her dower in the manner prescribed by law, denied that she was entitled to an admeasurement of dower, and pleaded specially the statute of ten years of adverse

possession, and also the statute of thirty-one years and alleged plaintiff was forever barred thereby to any right or title to said property. The reply took issue. The case was tried upon an agreed statement of facts in the record, in the form of a written stipulation signed by the parties, and upon some supplemental testimony, given by the real estate agent, who had charge of the property and knew of its condition for thirty or thirty-five years, whose testimony is not however set out under appellant's abstract. A summary of the agreed statement of facts is, to-wit: That the plaintiff is the lawful widow of Michael Jodd, deceased, having intermarried with him, on the 26th of October, 1848; that the said Michael Jodd died December 30, 1878; that the defendant in the action was tenant in possession under other persons than the children and widow of Michael Jodd, deceased; that said Michael Jodd and the plaintiff were in possession of the premises on the date of a deed of trust, executed thereon by them, on May 1, 1875, and until the death of said Jodd in 1878; that they held possession under a provision of said deed of trust, whereby the premises were let to the grantors therein until a sale, under said deed, upon payment of a monthly rent of one cent, and upon an agreement to deliver possession when said deed of trust should be foreclosed; that said deed of trust was jointly executed by Michael Jodd, and the plaintiff, his wife, on May 1, 1875, and conveyed the property to Alfred Fleming and John F. Lee, as trustees for the benefit of Mary E. Fleming, and her legal representatives. Said agreed statement of facts then concludes, to-wit:

"7. It is admitted that the real estate mentioned and described in said deed of trust of May 1, 1876, was duly sold by said trustees Alfred Fleming and John F. Lee on September 18, 1879, and at said sale the said defendant, Mary E. Fleming, became the pur-

chaser thereof. The trustee's deed may be read in evidence.

"8. It is admitted that the legal representatives of said Mary E. Fleming were at all times since, and are now, in possession of said real estate openly and under a continuous claim of absolute title thereto by and under the sale of said premises under and through said deed of trust executed by said Michael Jodd and his wife, the above-named plaintiff, by said trustees Alfred Fleming and John F. Lee, to the said Mary E. Fleming, on September 18, A. D. 1879.

"9. It is admitted that the equitable title to the premises in dispute emanated from the Government more than fifty years before the bringing of this suit, and that neither the plaintiff, nor any one under whom she claims, has paid any taxes on said premises, or any part thereof, for any part of thirty-one years next preceding the institution of this suit.

"10. Either party is at liberty to prove any other relevant, competent and additional facts which are not inconsistent with the facts herein admitted."

Upon the submission of the case to the trial court without the aid of a jury, judgment was rendered for defendant on October 6, 1911, from which plaintiff duly appealed to this court.

OPINION.

BOND, J. (After statement of facts as above).— Upon the calling of the cause in this court, it was submitted without argument, upon the briefs filed by both parties. It must be confessed that the abstract statement, brief and argument filed on behalf of appellant does not disclose that her motion for new trial was preserved in a bill of exceptions. And we might for that reason, under the repeated rulings of this court, decline to consider any question on this appeal other than those arising upon the record proper. [Jodd v. Lee,

256 Mo. 536; State ex rel. v. Adkins, 221 Mo. l. c. 120; Barham v. Shelton, 221 Mo. l. c. 70; Gilchrist v. Bryant, 213 Mo. l. c. 443; Thompson v. Ruddick, 213 Mo. l. c. 564.]

But a careful consideration of all that is contained in appellant's brief, including in that review the evidence contained in the agreed statement of facts, as if it had been properly preserved in the bill of exceptions, demonstrates that there was no error in the ruling made by the trial court in favor of the defendants, and this, for the reason, among others, that the agreed statements of facts show that plaintiff's cause of action falls strictly within the terms of the statute of repose pleaded in defendant's answer, and set forth in section 1884, Revised Statutes 1909: That is a familiar statute, and need not be quoted. It was first enacted in 1874. [Collins v. Pease, 146 Mo. l. c. 139.]

It applies to all titles, legal, as well as equitable, which have emanated from the Government more than ten years before the entry of lawful possession of any person holding the premises, which shall, or might be, claimed by another, and precludes any assertion of such claim, if it be shown that said claimant, or those under whom he derails title have not been in possession of said premises at any time within thirty consecutive years, and neither said claimant, nor those under whom he may hold, have paid any taxes for that period, nor within one year after its lapse, brought an action to recover the premises. The admission contained in section 9 of the agreed statement of facts shows that this case is within the plain language of the statute and is barred by the lapse of more than thirty-one years from the time plaintiff's right to dower accrued upon the death of her husband in September, 1878, and the institution of her suit on the 28th of October, 1910. [Sec. 1884, R. S. 1909; DeHatre v. Edmonds, 200 Mo. 246, 275; Crain v. Peterman, 200 Mo. 295, 299; Campbell v. Greer, 209 Mo.

199, 216; Dunnington v. Hudson, 217 Mo. 93, 101; Collins v. Pease, 146 Mo., supra.]

The judgment of the trial court was the only one which could have been rendered under the pleadings, and the facts admitted of record. It is therefore affirmed. All concur.

JACOB A. MIDDLETON v. FRANK T. BAKER and
JOHN H. BUCHANAN, Appellants.

Division One, December 2, 1914.

1. **TRUSTEE'S SALE: Mistake as to Time: Set Aside.** A mistake as to the time of sale of land advertised for sale under a deed of trust, coupled with great inadequacy of price and an offer of the beneficiary to pay all the costs of the sale made before he arrived on the ground, is a sufficient basis for setting aside the sale and ordering another sale.
2. ———: ———: ———: **Offer to Pay Costs.** Where the property was duly advertised for sale between nine and five o'clock, and was sold on the day mentioned at two o'clock, in the absence of the beneficiary in the deed of trust, who was mistaken as to the hour of sale and did not arrive until a few moments after the property had been sold by the sheriff as substituted trustee, at less than four per cent of its value and at about eight per cent of the debt, and where upon his arrival he requested the sheriff to resell the property and offered to pay all the costs then accrued and to guarantee that the property, if resold, would bring a fair market price, the sale should be set aside on the grounds of common justice.

Appeal from Callaway Circuit Court.—*Hon. N. D.
Thurmond*, Judge.

AFFIRMED.

J. R. Baker for appellants.

The judgment of the court was not warranted by the pleadings or the evidence: (1) The only reason

alleged and the only reason shown by the evidence for setting aside the sale was the inadequacy of the price. Inadequacy of price alone is not sufficient to set aside a sale. *Holdsworth v. Shannon*, 113 Mo. 508; *Davis v. McCann*, 143 Mo. 172; *Hanson v. Neal*, 215 Mo. 256. Especially is this true when the inadequacy of price seems to have been due to the mortgagor's own conduct or to his carelessness or his indifference to his interests. 27 Cyc. 1507. As the sale is made at the instance of the beneficiary, it is only reasonable that this doctrine should apply with equal or greater force to him. (2) The effect of the judgment is to grant respondent relief from a situation brought about by his own negligence. One cannot plead and prove his own negligence as a ground for relief. *Sands v. Brewing Co.*, 131 Mo. App. 416; *Felver v. Railroad*, 216 Mo. 211. And this doctrine applies to sales under mortgage or deed of trust. 27 Cyc. 1507. The evidence in this case shows that the respondent was not at the sale to protect himself through sheer negligence. He knew the time and place, had fixed these himself, and was at or near the place of sale at the time of the sale, but failed to attend. (3) Equity demands that he who seeks equity must come with clean hands. The respondent in this case certainly does not come with clean hands. (a) Because his own evidence shows that although he only loaned the negroes, debtors and grantors in the deed of trust, the sum of fifty dollars, yet he held their note in the sum of two hundred and twenty-seven dollars secured by the deed of trust under which this sale was made. (b) Because respondent's own evidence shows that he stayed away from the sale in order and with the purpose of having the sale at an unusual hour, at a time known to no one but himself and to suit no one but himself. This court has a right to draw reasonable inferences as to the motive for such conduct. The evidence shows that respondent was familiar with such sales and had conducted a number in his own

way. (4) Respondent has not offered to refund to appellants the money which they have spent or shown any disposition to put them *in statu quo*.

E. L. McCall for respondent.

(1) Plaintiff had no agreement with the sheriff trustee that the land was to be sold between one and two o'clock in the afternoon—the evidence shows nothing of the kind. The evidence shows that the plaintiff was innocently mistaken as to the time the land would be sold—thinking it could be sold any time between the hours of nine o'clock in the forenoon and five o'clock in the afternoon, as stated in the deed of trust. Plaintiff reached the place of sale ten minutes after two o'clock, and learned that the land had just been sold—and then and there he demanded of the sheriff-trustee a resale of the property—offering to pay all costs and make the land bring the full amount of his debt, amounting to \$338. One witness testified that he desired bidding on the land, but reached the place of sale too late. He also stated the value of the land to be \$600 or \$800. The sheriff stated that he never paid the purchase price of the land over to plaintiff. In *Griffith v. Handley*, 10 Bosw. 587; cited in *Holdsworth v. Shannon*, 113 Mo. 523, it was held that such a mistake as to time of sale was a case of surprise, which coupled with inadequacy of price, justified setting the sale aside.

WOODSON, P. J.—This is an act brought in the circuit court of Callaway county, by the plaintiff against the defendant to set aside a sale of real estate, sold under a deed of trust, executed to secure borrowed money.

The grounds for relief, as charged, were fraud, mistake, surprise and inadequacy of consideration paid for the land, etc.

The judgment was for the plaintiff and the defendant appealed to the Kansas City Court of Appeals, and that court certified the case here under the Constitution.

The record is short, the facts few and practically no conflict in the testimony. The facts of the case are substantially as follows:

On and prior to July 1, 1905, N. M. Baker, Lidia Baker, William Baker and Nancy Baker owned forty acres of land situate in Callaway county, Missouri, particularly described in the petition. On that date they made and delivered to the plaintiff, James A. Middleton, their promissory note for the sum of \$227.20, bearing eight per cent interest, due one day after date, and executed the deed of trust conveying said land to secure said loan. Said note not having been paid when due, the plaintiff requested the defendant, John H. Buchanan, the sheriff of said county, the substituted trustee (the one named in the deed of trust having died), to advertise and sell the land to pay said note. In pursuance to said request and according to the terms of said deed the trustee advertised the land for sale at the west front door of the court house, at Fulton, on August 1, 1910, between the hours of nine o'clock in the forenoon and five o'clock in the afternoon, and on said day at the hours of two o'clock p. m. he sold said land to the defendant Frank T. Baker, for the sum of \$26, a stranger to all the transactions.

All the Bakers save the last one mentioned were negroes; and the latter was an old friend of the makers of the note, and claimed to have acted for them in the purchase of the land at the trustee's sale, but he never mentioned that fact to the trustee or anyone else present at the sale; and if I understand the record there was no evidence introduced tending to show he was acting for the makers. At the time the sale took place neither the plaintiff nor any of the makers of

the note were present, which fact was known to the trustee.

There was other land sold immediately preceding the time the sale of this forty acres took place. There was a large crowd present, but only two bids were made for this land. The defendant Baker being one of them, and he being the highest bidder, became the purchaser; and he immediately paid the purchase price, and the trustee executed to him a trustee's deed conveying to him the land mentioned.

The weight of the evidence shows that the plaintiff was innocently mistaken as to the time the land was to be sold, and for that reason was not present at the exact moment the sale took place, but appeared a very short time thereafter; but a few minutes. Upon learning of the sale he immediately, then and there, requested the trustee to resell the land, but the trustee declined to so do—hence this suit.

At the date of the sale there was due on the note the sum of \$338, and the evidence tended to show that the land was worth from \$600 to \$800.

The plaintiff contends, and the greater weight of the evidence shows, that he was innocently mistaken as to the exact hour at which the sheriff would offer the land for sale, and for that reason he was a few minutes too late to be present at the sale, and was therefore taken by surprise.

In addition he contends that because of the fact that the land sold for only \$26, about eight per cent of the debt, and from three to four per cent of the value of the land, the sheriff should have declared the sale void and resold it, especially in the light of the facts that plaintiff offered to pay all the costs then accrued, and offered to guarantee that the land, if resold, should bring its fair market value.

In the case of Griffith v. Hadley, 10 Bosw. 587, it was held that a mistake as to the time of sale, coupled with the fact of inadequacy of consideration paid

therefor, without much competition, justified the court in setting aside the sale, and ordering a resale. That case was cited with approval in the case of Holdsworth v. Shannon, 113 Mo. l. c. 523.

If those authorities are to be followed in this case, which I think they should be, upon the grounds of equity and common justice, we must hold that the sheriff did not properly perform his duties in the premises, but should have set the sale aside and resold it, then and there, if the bidders had not dispersed, which the evidence strongly tends to show they had not, or if they had done so, then readvertised it for sale for some future date, according to the terms of the deed of trust.

Entertaining these views I am satisfied that the judgment of the circuit court should be affirmed. All concur.

In re Application of SCOTT AIKEN for a Public Road; JOHN T. HOWELL, Exceptor, v. JACKSON COUNTY, Appellant.

Division One, December 2, 1914.

1. **PUBLIC ROAD: Appeal from Award of Damages to One Land Owner: Rights of Another.** It is only errors that affect appellant or plaintiff in error that are reversible. On an appeal by the county in a proceeding to establish a public road, from a judgment on the issue raised by one landowner by his exceptions to the *quantum* of damages awarded him, the county cannot be heard to interpose the right of another landowner whose land was taken and abided the report of the commissioners awarding him no damages. Such other landowner does not complain, and the county cannot complain for him.
2. ———: **Failure to File Exceptions to Commissioners' Report.** A landowner whose land is taken for a public road who fails to file exceptions to the commissioners' report awarding him no damages, cannot thereafter, if the county court had juris-

diction of all the landowners and the subject-matter, claim damages.

3. ———: ———: **Raised by County.** On an appeal by the county from the judgment of the circuit court awarding damages to one landowner who excepted to the award made by the commissioners and appealed from the verdict of a jury in the county court, such landowner cannot be punished because another who did not except to the report of the commissioners was awarded no damages for his land taken. The county after trial in the circuit court cannot except for the non-excepting landowner, nor compel him to come into court, and the landowner who did except is in no wise responsible for his failure to except.
4. ———: ———: **Not Raised Below.** Unless the point was made in the circuit court that no damages were awarded by the commissioners to a non-excepting landowner whose land was taken for the public road, it cannot be considered on appeal.
5. **MOTION IN ARREST: Erroneous Judgment.** In order to raise the point on appeal that the judgment is erroneous in that it is not responsive to the issues, there must be a motion in arrest.
6. **PUBLIC ROAD: Appeal to Circuit Court: Matters for Consideration: Judgment.** Where the county court found the road to be necessary and entered judgment establishing it, and a landowner appeals to the circuit court solely from the award of damages to him, the judgment of the county court establishing the road is not drawn in question or put in jeopardy by the appeal, and to that extent the judgment remains final, operative and self-enforcing, and it is not necessary for the judgment of the circuit court to find the jurisdictional facts upon which the location and establishment of the public road depends.
7. ———: ———: ———: **Affidavit for Appeal: Merits.** An affidavit for appeal by a landowner from the award of damages by the jury in the county court to him for land taken in which it is stated that he "is injured by the verdict of the jury and the judgment of the court, and this appeal is from the merits and an order and judgment taxing costs," when fairly read, means that the appeal was taken only from the verdict and judgment for damages and costs, the word "merits" being due to the statutory relation between appeals from justices' courts and from county courts.
8. ———: ———: **Liability of County for Damages.** When the county court has found the proposed road to be of sufficient public utility to warrant its establishment at the expense of the county, has caused it to be opened and has taken pos-

Howell v. Jackson County.

session, the county thereby becomes irrevocably bound, by its own election, to pay the damages assessed in the circuit court in favor of a landowner whose property was taken for the road and who excepted to the commissioners' award and to the verdict of the jury in the county court, and appealed to the circuit court on the issue of the amount of damages alone.

9. ———: Measure of Damages: Fences: Twice Added. In estimating the damages to a landowner caused by constructing a public road through his land, the jury may be instructed that, in estimating his damages, they may take into consideration the cost of building a new fence, when such fence is necessary; but they should not be told to "consider the quantity and value of the land taken for the road, and also the cost of building the necessary fences along said road, and damage to the whole tract of land of which that taken forms a part, and from the sum of these deduct the benefits peculiar to such tract;" for that is, in effect, by loose language, to tell them to add the cost of the fence to the sum of the value of the land taken and damage to that not taken, when, in fact, the cost of fencing is but one of the elements that go to swell the owner's damage.
10. ———: ———: ———: ———: Error Corrected on Appeal. Where the verdict is swollen by a definitely ascertained and segregated erroneous amount, the false item may be eliminated by excision, by requiring a *remittitur*. Where the instruction authorized the jury to return a verdict for the value of constructing a fence made necessary by the establishment of a public road, in addition to the value of the land taken and damage to that not taken, and all the witnesses agree on the cost of such a fence, that cost will be deducted from the gross amount of the verdict for damages, as a condition of affirmance.

Appeal from Jackson Circuit Court.—*Hon. Walter A. Powell*, Judge.

AFFIRMED (*conditionally*).

Rozelle, Vineyard & Thacher and *Frank A. Boys* for appellant.

(1) The court erred in giving at request of respondent, over the objection of appellant, instruction A, because it required the jury to assess the cost of fences as a distinct item of damage and it also contains

overlapping provisions. *Railroad v. Murphine*, 4 Wash. 448; *Glendenning v. Stahley*, 173 Ind. 681; *Farmers Co. v. Cooper*, 54 Colo. 409; *Newgass v. Railroad*, 54 Ark. 145; *Pittsburg v. McCloskey*, 110 Pa. St. 436; *Curtain v. Railroad*, 135 Pa. 20; *Hanrahan v. Fox*, 47 Iowa, 102; *Henry v. Railroad*, 2 Iowa, 288; *Commissioners' Court v. Street*, 116 Ala. 36; *Lewis on Eminent Domain*, sec. 498; *Jackson County v. Waldo*, 85 Mo. 637; *Railroad v. Knapp, Stout & Co.*, 160 Mo. 396; *Railroad v. Baker*, 102 Mo. 553; *Newby v. Platte County*, 25 Mo. 258; *Lingo v. Burford*, 112 Mo. 157; *Daugherty v. Brown*, 91 Mo. 32; *Bennett v. Hall*, 184 Mo. 421; *Railroad v. Fowler*, 142 Mo. 679; *Railroad v. Ridge*, 57 Mo. 601; *Railroad v. Waldo*, 70 Mo. 631; *McElroy v. Air Line*, 172 Mo. 555; *Hickman v. Kansas City*, 120 Mo. 122; *Bridge Co. v. Stone*, 194 Mo. 188; *Combs v. Smith*, 78 Mo. 32. (2) The judgment of the circuit court is invalid because the court made no finding of the jurisdictional facts which would authorize the road to be established and the judgment incorporates no order establishing the road. *R. S. 1909*, sec. 10440; *Bennett v. Hall*, 184 Mo. 407; *Allen v. Welch*, 125 Mo. App. 287; *Williams v. Kirby*, 169 Mo. 629. (3) The judgment is invalid because it appears from the face of the record that the damages to the land of John P. Webb affected by the proposed road were not considered or determined. *R. S. 1909*, secs. 10438, 10440; *State ex rel. v. Gill*, 84 Mo. 248; *Constitution*, art. 2, sec. 21; *Peterson v. Smith*, 6 Wash. 163; *Kitsap v. Melker*, 52 Wash. 59; *Askam v. King County*, 9 Wash. 1; *Kime v. Cass County*, 71 Neb. 677; *Levee Comm. v. Dancy*, 65 Miss. 341; *State v. Fisher*, 43 N. J. L. 377.

L. T. Dryden for respondent.

(1) Instruction A correctly stated the law. In *Galbraith v. Prentice*, 109 Mo. App. 498, which was an appeal from a judgment assessing damages in favor of

Prentice for the opening of a public road through his farm, a very similar instruction to this was given, and was held to correctly state the law. Appellant's counsel has cited a number of cases from other States and some Missouri cases; but the most of the Missouri cases cited are railroad cases, where the railroad was seeking to condemn land for its right of way. Under our statutes, the railroad company is bound to build and maintain fences on either side of the right of way, at its own expense. This being true, of course the property owners in such cases would not be entitled to recover any damages for building fences. See R. S. 1909, sec. 3145; *Railroad v. Fowler*, 142 Mo. 679. (2) The appeal was not taken from the order of the county court establishing the road, but from the verdict of the jury and the judgment of the court on the assessment of Howell's damages. The circuit court had no jurisdiction to make any finding, authorizing an establishment of the road. That question was not before the court. R. S. 1909, secs. 10440, 4091, 7570. The "merits" referred to in the affidavit referred of course to the damages which the jury had allowed him and to nothing else. The whole of appellant's argument upon this point is not based upon the facts in this case and the authorities are therefore not in point. (3) All parties tried this case in the circuit court upon the theory that the appeal was only from the verdict and judgment on the assessment of the damages allowed Howell, respondent herein. No reference is made by either party to any other question. This being true, the appellant here is bound by that theory, and cannot seek to adopt a different one in this court. *Dougherty v. Gangloff*, 239 Mo. 649; *Jones v. Pub. Co.*, 240 Mo. 200; *O'Hara v. Gas Light Co.*, 244 Mo. 395; *Railroad v. Himmelberger*, 247 Mo. 179; *O'Hara v. Gas Light Co.*, 131 Mo. App. 428; *Rogers v. Foundry Co.*, 167 Mo. App. 228.

LAMM, J.—Appeal by Jackson county from a judgment for damages in favor of a landowner.

No remonstrance having been filed in the matter of locating and opening a public road in Sni-a-bar township, Jackson county, presently proceedings were had culminating in orders in the county court finding jurisdictional facts together with the practicability of the road, that same was of such public utility as warranted the location, establishment and opening thereof at the expense of the county, etc., the petitioners depositing the probable damages, estimated at \$200, in the county treasury. It was further ordered that the proper named officer view, survey and mark out the road and take relinquishments of rights of way, etc. Presently, such officer made report in due statutory form, showing, among other things, that the road ran through the land of John T. Howell, who claimed damages in the sum of \$2000. On the approval of that report, three disinterested freeholders were appointed commissioners to view the premises, hear complaints and assess damages to the owners of property not relinquishing the right of way, the court further finding anew that the road was of sufficient public utility to warrant the opening and establishment thereof at the expense of the county. Presently, after qualifying, those commissioners reported assessing Howell's damages at \$400.

Going back a little, there was another property-owner who did not relinquish the right of way, to-wit, John P. Webb. As to Webb the commissioners reported "damages, none." To that assessment, Webb filed no exceptions.

(*N. B.*: No question is raised on the regularity of any of these preliminary matters or to the jurisdiction of the county court; hence details become unimportant.)

On the coming in of the commissioners' report, John T. Howell in due time filed his written exceptions

to the effect that the damages allowed by the commissioners were inadequate, and he claimed and asked for a jury to assess the same. Presently, on the coming in of these exceptions, a statutory jury of six freeholders was impaneled and, on a trial, it brought in a verdict assessing his damages at \$200. Presently, upon that verdict the road forty feet in width was established as a public road by the judgment of the county court, describing it, the parties owning land through which the road ran were allowed until the following March to give possession and open the same, a warrant was ordered issued to Howell, and he, in turn, was ordered to pay all costs accruing since the date of filing his exceptions.

In due time Howell perfected his appeal to the circuit court, his agent's affidavit for appeal, among other things, stating: ". . . he believes the appellant is injured by the verdict of the jury, the judgment of the court, and that this appeal is from the merits and an order and judgment taxing costs." Thereupon a transcript of the proceedings was filed in the circuit court of Jackson county, and presently at a trial there, on the question of damages alone, a new jury awarded him \$1500, and judgment followed against Jackson county for that sum. On the coming in of a motion for a new trial, the court required a *remittitur* of \$200, which was made. It thereupon entered a new judgment for \$1300, at the same time overruling the motion. From that judgment, Jackson county appeals.

The motion for a new trial was put on the grounds that the verdict was against the evidence, the weight of the evidence, the law and the evidence, showed passion and prejudice and was excessive. Furthermore, that the court erred in giving three instructions, A, B and C, for plaintiff; also in admitting incompetent testimony over the objection of defendant and in excluding competent testimony offered by the defendant.

At the trial in the circuit court, Webb did not appear, nor did anyone appear for and on behalf of any of the petitioners for the road. The only appearances were on behalf of Howell, exceptor, on one side, and Jackson county on the other. The following excerpt from appellant's statement sufficiently indicates the scope of the last trial:

"The trial of the case in the circuit court was also directed solely to Howell's claim for damages." (And we may add, the judgment was limited to his damages.) "No evidence was introduced concerning the damages of John P. Webb and the jury in their verdict made no reference to him at all. Neither was any evidence introduced to show the signers of the petition were qualified freeholders, or that notice had been given of their intention to present their petition to the county court, or that the road was of sufficient utility to warrant its establishment at the expense of the county."

The record shows that appellant objected to no testimony below and that no testimony offered by appellant was excluded; nor is it now contended there was any error in instructions B and C given for plaintiff; nor that the verdict, as a verdict, is against the evidence, or the weight of the evidence, or the law and the evidence; nor that the jury was actuated by passion and prejudice against defendant. So that, by elimination, appellant reduces its assignments of error materially, as will appear in due course.

Challenged instruction A reads (the italicized clause containing the alleged vice).

"The court instructs the jury that in assessing the damages to the landowner Howell you should consider the quantity and value of land taken for the road, together with improvements thereon, if any, *and also the cost of building the necessary fence along said road, if any*, and damage, if any, to the whole tract of land, of which that taken for the road forms a part, by reason of the road running through it, and from the sum

of these deduct the benefits, if any, peculiar to such tract; that is to say, benefits peculiar to the tract itself and not shared in common by it and other lands in the same neighborhood."

The record shows the road was opened from end to end and side to side in due time under the judgment and orders of the county court, and, as we understand it, has ever since then been and is now in use as a public road.

In taking its appeal, appellant county filed no motion in arrest, but stood alone on its motion for a new trial.

So much for a statement of the case.

The questions here are three, to-wit:

(1) That respondent's instruction A was erroneous in that it contained overlapping items on elements of damage and required the jury to assess the cost of fences as a distinct item of damages.

(2) That the judgment is invalid because the circuit court made no finding of jurisdictional facts authorizing the road to be established and the judgment incorporates no order establishing the road.

(3) And is invalid because, on the face of the record, it appears that damages to the land of John P. Webb was not considered or determined.

Of these in inverse order:

I. *Of Webb's damages.*

The road statutes direct that any party in interest may file written exceptions to the report of the commissioners assessing damages. Thereupon a jury of six freeholders, qualified under the law to act, shall be summoned, which jury "shall try the case anew on the question of damages, *in each case separately.*" [R. S. 1909, sec. 10438.] On certain contingencies the county court is authorized to order the road established and opened and one of these contingencies is "if the parties in interest fail to file written exceptions

thereto." [*Ibid.*, sec. 10439.] Turning to section 10440, *Ibid.*, it contemplates an appeal by "either party" to the circuit court "from the judgment of the county court assessing damages, or for opening . . . any road." We shall assume for the present, for the purposes of the point in hand, that Howell's appeal to the circuit court was not from the judgment opening the road, but from the verdict on the issue raised by his written exceptions on the *quantum* of damages and from the judgment on that verdict. From this viewpoint how stands the case on the assignment of error relating to the non-assessment of damages for the appropriation of Webb's land for the road?

In our opinion the point is without substance, because:

(1) In the first place, in so far as the point concerns Webb and his rights, he is not a party to this proceeding. Not being in court, appellant is not entitled on its appeal from the Howell judgment to interpose the rights of Webb, if any he have. It must let Webb speak for himself. An appellant is not allowed two voices on appeal, one for itself and another for some party absent and not complaining. One voice is enough. It is only errors that affect appellant or plaintiff in error that are reversible, and courts lend an attentive ear to none other. [*City of St. Louis v. Lanigan*, 97 Mo. l. c. 180; *R. S.* 1909, sec. 2082; *Kansas City v. Woerishoeff*, 249 Mo. l. c. 24.]

(2) In the next place, an analysis of the sections of the road statute cited *supra* put it beyond question that the county court had jurisdiction over all landowners affected by the establishment of the road. Webb was one of them. When the commissioners with notice to him (i. e., by an order entered in a proceeding to which he was a party) were appointed to assess damages, view the premises and hear complaints and, in the performance of that duty, reported he was not damaged, the statute provided him a remedy he could

take or leave, to-wit, to file exceptions and have his damages assessed anew. Webb being in that fix and standing mute, do we understand learned counsel now appearing for appellant county to take the position that Webb could neglect to file exceptions, allow the road to be located without protest, and, not only so, but open the road himself in pursuance to the court's order and turn it over to the public and thereafter claim damages? An answer to that question is not necessary to our case, but we may as well say while we are about it that we do not so understand the law. In *Seafeld v. Bohne*, 169 Mo. l. c. 551-2, are some observations in point. In that case no exceptions were filed to the commissioners' report and after the time for filing the same had expired, the court took up the case and made the final order (p. 550), precisely as it did in this case, so far as Webb is concerned. In that condition of things, VALLIANT, J., speaking for this division of the court, said:

"But when private property rights are threatened it is the duty of the owner to avail himself of the process of law for his protection, and if he stands by and allows a court in the exercise of its rightful jurisdiction to decide questions of law or of fact contrary to the correct interpretation of the one or to the weight of the evidence as to the other, and neglects the means at hand to correct the error he cannot afterwards treat the whole proceedings of the court as a nullity."

(3) In the next place, Howell being in nowise to blame for the absence of Webb in the county court or in the circuit court, how comes it he stands to be punished for what did not concern him? Counsel appearing for the county on this appeal, and raising the point for the first time, were not its trial attorneys in the circuit or county court. Evidently those trial attorneys concluded, when the commissioners found Webb was not damaged, that the next move was up to him under the statutory plan of opening roads. They fur-

ther concluded, since he made no move, that silence showed consent and that the finding of the commissioners became conclusive on him, hence their client, the county, was in no danger of being mulcted thereafter in damages for the appropriation of his land. There is no escape from this conclusion, because, being learned in the law, they permitted the judgment of the county court to go establishing and opening the road. Having done that, does it lie in the mouth of the county at this late day, when new hands have come to the bellows, to face about and change its view on that question on appeal to this court?

Moreover, if learned counsel now appearing for the county are right in their contention, then the county has the road without paying Webb's damages. If, peradventure, the conscience of the county be pricked in that behalf, a ready remedy is at its door. It can ease its conscience by paying them at any time without our meddling with Howell's judgment for his separate damages, inasmuch as a reversal will not pay Webb. If, as we fear is the case, it is not conscience, but supposed danger from that angle that is behind the point and puts life and mettle into its heels, then, how will that danger be lessened by reversing Howell's judgment? Will reversal here parry the menace? Can the county make Webb interpose, or does it want to make Webb come into the circuit court on Howell's appeal, *willy nilly*, and claim his own separate damages? Or, absent Webb, are his damages to be awarded him without his having a finger in the pie, a day in court? All those things, we opine, would be new wrinkles in road litigation for which there are no precedents known to us. If he was a bold man who first ate an oyster, as Swift tells, what should we say of a court that added new terrors to road litigation?

(4) Finally, no such point was made below during the trial, or in the motion for a new trial. The circuit court ruled on no such question; *ergo* we may not.

Attend to the lawmaker's mandate in that behalf: "No exceptions shall be taken in an appeal or writ of error to any proceedings in the circuit court, except such as shall have been expressly decided by such court." [R. S. 1909, sec. 2081.]

II. *Of the failure of the circuit court to find jurisdictional facts and to incorporate an order establishing the road in the judgment.*

Although appellant has its road in full and undisputed possession, yet it suggests that it ought not to pay Howell's damages because it fears its title to the road is bad for that the judgment in the circuit court is a straight award of money damages and makes no finding of jurisdictional facts and does not in terms establish a public road. Is that assignment of error well taken? Decidedly not, because:

(1) In the first place, it cannot be contended that the circuit court has no jurisdiction at all in the premises. It must be conceded it had jurisdiction to try the issue of damages and enter judgment thereon. If, now, it also had jurisdiction on Howell's appeal, as appellant contends, to find jurisdictional facts upon which a road could be established and had jurisdiction to establish the road, its jurisdiction to do those additional things would depend on the *form* of the appeal, as pointed out in the former paragraph and as ordained in Revised Statutes 1909, section 10440, *supra*. That section provides for two kinds of appeals—one from the damages, the other from the order establishing the road. Let us also concede, only *pro hac vice*, that Howell's appeal brought up to the circuit court the issues of establishing and opening a road (i. e., the question of road or no road) and for the same turn let it be admitted it was error to make no finding on those issues. With such concessions, made by way of argument, the questions obtrude at once: Was there any exception taken below? Was the question raised to

be ruled *nisi*? The answer must be, no. This appellant as the record shows got all it wanted from the court below on those scores. Howell was not opposing the road, nor was he seeking to establish the road. He was asking damages for the actual appropriation of his land. That was the sole issue interesting him. In that view of it, the burden was on appellant to show these jurisdictional facts, if on any one. This burden appellant lightly cast off. Moreover, when the judgment was rendered did appellant file a motion in arrest because on the whole record the judgment was erroneous as not responsive to the issues? No. *Contra*, it rested content with the *form* of the judgment, took its exception on other questions and raises the point in hand for the first time in this court. If the question here was whether the circuit court had jurisdiction to render any judgment at all, we would have a question of different quality; but unless we are to rule that a motion in arrest no longer serves any purpose in practice whatever, we must hold one was necessary in this case. [Murphy v. Railroad, 228 Mo. l. c. 85; Stid v. Railroad, 211 Mo. 411, and cases cited; *vide*, State ex rel. v. Fisher, 230 Mo. 325, *arguendo*.] And that its absence is fatal to the point.

(2) In the next place, if it be conceded that no motion in arrest was necessary to preserve the point, yet on this record we are forbidden by the statute to reverse the judgment on the point. This is so because the circuit court did not rule on any such question, and, absent its decision, we can make none. [*Vide* the statute quoted *supra*, R. S. 1909, sec. 2081.]

(3) In the next place, this record shows conclusively that no appeal was taken on the issue of road or no road but only on the issue of damages. [Bennett v. Woody, 137 Mo. 377.] Therefore the judgment of the county court establishing and opening the road was in no sense drawn in question or put in jeopardy by the appeal, but was left behind a final, operative,

self-enforcing judgment, free from the vicissitudes of the event of the appeal and not a whit depending on the circuit court's finding jurisdictional facts on which the location of a public road depends. Why should the circuit court go out of its way to do over again, by a side stroke, what had already been well and finally done in the county court? The maxim is: A court has nothing to do with what is not before it.

Moreover, not only was such the trial theory and therefore the preclusive theory on appeal, according to the settled doctrine of this court, but the affidavit for appeal clearly shows, when fairly read, that the appeal was taken only from the verdict and judgment for damages and costs. That the word "merits" was used in the affidavit of appeal is due to the statutory relation between appeals from justices' courts and from county court, and the context shows the merits meant were those on the issue of damages. It results that when the county court found the road was of sufficient public utility to warrant its establishment and opening at the expense of the county and (closer home) when it went on and opened it and took possession and when (still closer home) Howell's appeal did not bring up the issues of road or no road, but only that of his damages—we say, when all these things happened, as they did, then the county by its own election became irrevocably bound to pay the damages whenever they were set at rest by being legally awarded by an adjudication on his appeal. [Forsyth v. Heege, 61 Mo. App. 277.] The point is disallowed to appellant as without substance.

III. *Of instruction A.*

With foregoing questions at rest, we confront the main contention in the case, *viz.*, that instruction A overlapped on the elements of damage and permitted recovery for the cost of fencing as a separate and spe-

cific item. We are of opinion this assignment is well laid, because:

(1) While a strained construction of the language of an instruction is not a sensible device for administering justice, neither is a loose or illogical construction. As put by Professor Gray: "A loose vocabulary is the fruitful mother of evils;" and, we may add that a loose construction of loose language is the nursing father of many more. Giving the language of the instruction a sensible interpretation, it is plain that the jury were told to consider the cost of building the necessary fences along the road *and* the damage to the whole tract of land of which that taken for the road forms a part, and they were told that from the "sum" of these, together with the value of the land taken, they were to deduct the benefits, if any, peculiar, etc. That meaning is a fair and legitimate one, nay, the only one shining on the very face of the instruction itself. There can be no two ways about that. If now, it be the law (as we shall presently see it is) that necessary fencing is an element, to be sure, but is only an integral element of the damages to the land, and submerges itself into such damages, then the instruction was erroneous; for the jury under instruction A would assess as damages (1) the value of the land taken and improvements, (2) next, the cost of building the necessary fence, (3) next, the damage, if any, to the whole tract by reason of the road running through it, and would add one item to the other, thereby making a "sum," and from that sum it would deduct the benefits peculiar to the tract, etc.

The general rule for assessing damages for taking lands for a public highway and railroads is not in doubt. It is (put in small compass) the value of the land taken and the damage, if any, to the tract of which it forms a part, from which must be deducted the benefits, if any, peculiar to such tract arising from establishing the road. [McReynolds v. Railroad, 110 Mo.

l. c. 487 et seq.; *Bennett v. Woody*, 137 Mo. l. c. 383; *McElroy v. Air Line*, 172 Mo. l. c. 555.] Cases may be found where the jury have been told that in estimating those damages they may take into consideration this or that item, for example, fencing, when that is necessary to be done by the landowner, and respondent cites us to a case in the Court of Appeals, *Galbraith v. Prentice*, 109 Mo. App. 498, claimed to sustain the instruction, but in that case the jury were told what elements to take into consideration. They were not told as here to add the fencing to the value of the land taken "and" to the damage to the land.

We are convinced that the cost of fencing when necessary is but one of the elements that go to swell the owner's damage to the land, and which latter, when added to the land actually appropriated, make the total of his damage to be diminished by peculiar benefits, if any. There is no controlling pronouncement in any of our cases to the contrary, and the well reasoned cases elsewhere seem to so hold.

The right doctrine is announced by Lewis (2 Lewis on Eminent Domain [3 Ed.], sec. 741), thus:

"Where, by taking a part of a tract, additional fencing will be rendered necessary in order to the reasonable use and enjoyment of the remainder, as it probably will be used in the future, and the burden of constructing such additional fence is cast upon the owner of the land; then the burden of constructing and maintaining such fence in so far as it depreciates the value of the land, is a proper element to be considered in estimating the damages. In some of the cases cited an allowance was made for the cost of fencing as a specific item, and the language of many of the decisions seems to warrant the same view. But this is clearly not correct, unless such an allowance is required by the statute under which the proceedings are had. It is a question of damage to the land, as land. If, in view of the probable future use of the land, ad-

ditional fencing will be necessary, of which the jury or commissioners are to judge, and the owner must construct the fence if he has it, then the land is depreciated in proportion to the expense of constructing and maintaining such fencing. Nothing can be allowed for fence, as fence. The allowance should be for the depreciation of the land in consequence of the burden thus cast upon it. Evidence of the cost of suitable fencing is competent as affording a means of arriving at the extent of the burden. Where by statute a railroad is bound to fence its right of way, no allowance can be made to the owner for that purpose."

The testimony was put in in a way to stress the error. Some of the witnesses testified to the damage from the depreciation in value of the farm as a farm by running the road through it and cutting off sixty acres, giving figures. Some testified to the same thing and then, as an additional item, were asked about the cost of fencing; so that when the testimony was in and the erroneous instruction was listened to by the jury, it is plain from the amount of damages they returned that it was built up precisely as the instruction directed.

(2) But the situation is such that this erroneous instruction ought not to reverse the judgment and necessarily remand for a new trial. This is so because: All the witnesses, testifying to the cost of the fence, agree on the cost, putting it at \$338.66. Deducting that sum from the judgment amount, we have left \$961.34, as a good round judgment for respondent and all the testimony will support.

Where the verdict is swollen by a definitely ascertained and segregated erroneous amount, as here, the false item may be pinched out, eliminated by excision, under the reasoning of our cases, by requiring a *re-mittitur*. The right of judicial excision of such an item was the underlying groundwork of our present doctrine

of *remittitur* which has gone, in its later developments, far beyond that.

If, therefore, respondent within ten days will enter a *remittitur* of \$338.66, his judgment will be affirmed for \$961.34, to bear interest from the date of its rendition. Otherwise, the judgment will be reversed and the cause remanded for a new trial. All concur.

TILLIE WESSEL, Appellant, v. C. L. LAVENDER.

Division One, December 2, 1914.

1. **PLEADING: Proof: Surplusage.** Proof is required of those allegations only that are necessary to a recovery, and those unnecessary to that end may be eliminated as surplusage.
2. ———: ———: ———: **Action for Ravishing Unconscious Female: Cause of Unconscious State: Not an Issue: Instructions.** Where the petition in an action for damages for ravishment alleged that the defendant, a physician, administered medicine to the plaintiff while she was sick in bed, and she having become unconscious under the influence of the medicine, the defendant had sexual intercourse with her, the cause of the plaintiff's unconsciousness was not an issue, and the giving of an instruction requiring a finding that it resulted from the medicine was reversible error.
3. **ACTION FOR RAVISHMENT: Female's After-agreement to Keep Silent: Her Testimony.** Where there is reversible error in an instruction, a verdict for the defendant in an action for damages for ravishment will not be affirmed on the ground that the testimony of the plaintiff, who had agreed to keep silent in consideration of a payment to be made to her by the defendant, was unworthy of belief.

Appeal from Warren Circuit Court.—*Hon. James D. Barnett*, Judge.

REVERSED AND REMANDED.

John W. Booth, Jesse H. Schaper and J. W. Delventhal for appellant.

T. W. Hukriede and Morton Jourdan for respondent.

BROWN, C.—This is an action by plaintiff for five thousand dollars actual damages and five thousand dollars punitive damages for ravishing her on April 16, 1908, while she was unconscious. She was, at the time of the injury complained of, married, about thirty years old, and lived with her family, consisting of husband and two children—Dalla, a girl ten years old, and Earl, a boy of six. The defendant had been their family physician for twelve years. His age is not given, but the fact that he graduated at the Washington University Medical School in 1865 indicated that he had arrived at the age of discretion. Mrs. Wessel had suffered from an ovarian trouble for which Dr. Lavender had been treating her. It caused her much pain at times, and he had been called to relieve her, and on the particular occasion in question he was called for the same reason, and administered the usual sedative by hypodermic injection. What is charged to have occurred is stated in the petition as follows:

“That on the said 16th day of April plaintiff’s husband was temporarily absent from his home and not expected to return for a period of about . . . days and the defendant knew that plaintiff’s husband was so absent and was not expected to return for said period of . . . days; and so knowing, defendant being in the course of his treatment of plaintiff for her sickness in her bed room in the presence of said minor children, administered to and caused to be taken by plaintiff, under the belief, on the part of plaintiff, that the same was necessary for her proper treatment for said sickness, a dose of medicine. That defendant having administered said medicine, plaintiff being then and

there sick and in bed, under the influence of said medicine, became and was unconscious, and that shortly thereafter plaintiff regained consciousness and upon regaining consciousness, defendant, then plaintiff's physician as aforesaid, was in bed with plaintiff, engaged in the act of committing sexual intercourse upon the body and person of plaintiff; that at the time defendant was undressed and plaintiff's minor children were absent from the room; that at the time when plaintiff as aforesaid discovered defendant in said act of violating her person, she at once separated her person from that of defendant, and thereupon defendant left plaintiff's bed and put on his clothes and departed."

On the trial the plaintiff testified in substance that on Monday evening April 13, 1908, she was suddenly seized with a painful aggravation of her trouble and called Dr. Lavender, who administered a hypodermic injection which relieved her. He also attended her the next day for the same purpose, but did not come Wednesday. On Thursday evening after retiring she was seized with a very painful attack and sent for Mrs. Struebe, a neighbor woman, and for Dr. Lavender. There was at the time, in addition to her own family, a young girl about fifteen years old staying in the house to assist her. She slept in a large room with two beds, one of which was occupied by this girl and her daughter, while the little son occupied the bed with her. Mrs. Struebe came and then the Doctor, who administered a hypodermic injection and sat by the bed to await its effect. It did not relieve her and he administered another. The two girls had, after the arrival of Mrs. Struebe, been sent to bed in a room across the hall and the boy had been placed in the other bed in Mrs. Wessel's room. Shortly after the administration of the two injections she became tired and went to sleep, the Doctor then being seated at the bedside and Mrs. Struebe at the foot of the bed. She

awoke with a smothering sensation, and found the Doctor in the bed engaged in the commission upon her of the act charged in the petition. She then said: "What in the dickens are you doing, doctor?" and called for her daughter. The Doctor said: "The kids aren't in here." She then called Mrs. Struebe and the Doctor said she had gone home. She said, "You get in the hall and call those kids out of there, you call them." He was then dressing and told her to be quiet, that it was not so bad. She asked him again to call the children. When he had completed his toilet he picked up his grip and she cried again two or three times to call the children, but he walked back into the kitchen and then returned to the bed and said: "Look here, Mrs. Wessel, now if you ain't quiet I will give you another dose of medicine." She then shut up mighty quick and kept still. He asked her how she was feeling and she said all right, and asked him again to call the children. He then went out and the two girls soon came into the room.

She further testified that the next morning the doctor called at her home, and coming into her room, shut the door and sat down near her bed. She asked him what made him do that to her the night before. He said it was not so bad, and not to make a great big halloo about it. After some talk in which he attempted to excuse himself, she called him "You dirty, nasty, stinking thing," and threatened to tell her husband. He tried with much talk to persuade her not to "make a great big howl about little or nothing," but she kept on fussing and he kept on arguing that it would ruin his reputation and that a murder might come of it. She insisted that she was going to tell Mr. Wessel, and after the fuss had lasted quite a while he said: "Well, I am willing to pay for the dirtiness and harm: it don't make any difference how much it will cost, if it costs me \$1000, just so you won't tell him." She vowed and declared for a while that she would, and finally

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said she would see about it. He said: "All right, Mrs. Wessel," and then after they had quarreled a little longer he went home. This talk lasted from half past six or seven o'clock that morning until half past eight or nine o'clock. In the afternoon he came back and after shutting the door asked her if she agreed to it. After they had argued a while, she said: "If you are willing to pay what I ask you, I will agree to it, to take the money." He said: "All right, Mrs. Wessel, are you honest?" She said, "Yes, honest to God," and they shook hands on it and made the agreement that he was to pay. She was not to tell her husband or anybody else. This final conference took about an hour. No amount was mentioned other than stated above.

Doctor Lavender testified that at the time of his call on the night of April 16, 1908, he stayed until Mrs. Wessel had gone to sleep after the administration of the second hypodermic and then went home, and that everything she testified to as having occurred afterward was purely fabrication, without any foundation in fact, and that he never had heard of any complaint of the kind until February 6, 1909, when she came to him with a bill as follows:

"Marthasville, Mo., Feb. 4, 1909.

"To Dr. C. L. Lavender \$500
for taking the advantage of me Mrs. Wm. Wessel while
I was under the influence of medicine."

On this paper were written by Dr. Lavender the following word and figures: "2-6-08. Received \$60."

Mrs. Wessel testified that when she made the bargain with the doctor he said he could not pay her until the first of the year, so that she waited until about the middle of January before saying anything more to him about it. In the meantime she was making monthly payments on the family doctor bill which he then told her had nothing to do with her bill against him, which he wanted her to make "reasonable." This induced

her to make it \$500 instead of \$1000. On February 4, Mr. Wessel asked her to pay the balance of \$57 still due on the family bill, which she did, taking her bill along, but had no opportunity to present it. She went back on the sixth, and when she presented it he said, "What are you going to do if I don't pay it?" They then quarreled, during which she asked him to call his wife and threatened to tell Mr. Wessel and that it would come out, and then started to go, when he caught her by the arm and after more talk paid her \$60 and marked it on the bill as it appears.

The Doctor says that she first presented the bill on February 6th and that when he refused to pay it, she presented a gun, and in terms oozy with profanity and ribaldry commanded him to pay some of it. He was scared, thought his life in danger, and gathered up \$60, the same bills she had paid him two days before, which he paid, marking it on the bill, which he put in his own pocket, where he kept it until he turned it over to his attorney. He had her arrested with due promptitude on the charge of robbery growing out of the manner in which she made the collection, and she brought this suit.

Dr. Lavender testified on the trial as to the kind and quantity of the medicine administered to Mrs. Wessel on the night of the alleged assault and introduced expert witnesses who testified that it would not ordinarily produce unconsciousness. The plaintiff requested and the court gave the jury the following instructions:

"1. The court instructs the jury that if they believe from the evidence that defendant on the 16th day of April, 1908, was the physician of plaintiff and as such physician gave to plaintiff one or more hypodermic injections and that within a short time thereafter plaintiff, being in bed in her home and defendant being present as such physician in the same room with plaintiff, fell asleep and that thereupon defendant,

while plaintiff slept (if she did so sleep), without the knowledge of plaintiff, got in bed with plaintiff and had sexual intercourse with plaintiff against her will and without her consent—then the jury will find a verdict in this case for plaintiff, and will assess her actual damages at such sum not exceeding five thousand dollars as in the judgment of the jury will fairly compensate plaintiff for such distress of mind, shame, humiliation and wounded feelings as the jury may find plaintiff sustained by reason of such intercourse.

"3. The court instructs the jury that if they find from the evidence that defendant had sexual intercourse with plaintiff against her will and without her consent on the 16th day of April, 1908, at a time when defendant was in attendance upon plaintiff as her physician and plaintiff in bed and asleep and her husband absent from home and that at the time of such intercourse no other persons were on the premises with plaintiff and defendant, except plaintiff's son, aged about six years, and her daughter, aged about nine years, and a girl employed about the premises, aged about fifteen years, and that on the following morning defendant returned and plead with plaintiff to say nothing about such intercourse and proffered to pay plaintiff damages if she would say nothing about such intercourse and that plaintiff was thereby induced to keep silent about such intercourse, then plaintiff's failure to make complaint to other persons of such intercourse will not defeat plaintiff's right to recover damages in this action for such intercourse. But the jury should take these circumstances and all the other facts and circumstances in evidence in consideration in determining whether the defendant did or did not have carnal knowledge of plaintiff against her will and consent."

At the request of defendant he gave the following instructions:

“8. The burden of proof is upon the plaintiff to show by a preponderance, that is, by a greater weight of the testimony, to the reasonable satisfaction of the jury, that the defendant engaged in the act of committing sexual intercourse upon the body and person of plaintiff against her will and while she was unconscious as a result of medicine administered to her by defendant, and unless she has so shown by the greater weight, that is, by the preponderance of the testimony, you will find for defendant.”

The verdict was for defendant.

I. The questions of fact in this case are simple, and it will assist us to reduce them to their lowest terms before proceeding to the examination of the questions of law predicated of them in this appeal. The wrong charged in the petition is that the defendant violated the plaintiff's person while she was unconscious. The answer is a general denial. Both parties testify that the defendant attended the plaintiff in his capacity of physician, at her request, at the time and place of the alleged commission of the wrong so charged, for the purpose of ministering to her in physical distress, and that he gave her remedies appropriate to her condition of suffering, and sat by her side until she slept. Up to this point their versions are in perfect accord, but here they diverge. He says that when she went to sleep he went away, leaving her in that comfortable condition. She says this is not true—that she was rudely awakened and found him engaged in perpetrating the outrage of which she complains, having already committed a capital felony. There are none of those questions of consent or resistance which are frequent features of such dramas. The sole question is upon the truth or falsity of these respective statements of the actors.

II. The defendant by his instruction number eight, raised the subordinate issue as to whether or

not the condition of unconsciousness which is admitted to have supervened to her upon the cessation of her pain was a result of medicine administered to her by defendant. He prepared the way by the introduction of expert testimony to the effect that the dose he said he administered would not ordinarily have caused unconsciousness. This testimony was not disputed; in fact, its effect could not be contradicted, because the defendant alone of all the world knew how much medicine he gave her. It is plain that if the cause of her unconsciousness was not in issue, but if the act charged was actually committed while she was unconscious from natural sleep induced by the cessation of her pain or otherwise, she was equally entitled to recover under the pleadings, then the giving of this instruction was highly prejudicial to the plaintiff. This raises the important question of the case.

The respondent does not contend that this limitation upon the plaintiff's right to recover is correct as an abstract proposition. He admits that the act with which he is charged would be equally actionable had the unconsciousness charged resulted from natural sleep, as in *State v. Welch*, 191 Mo. 179, but he attempts to justify the instruction on the ground that the statement of the petition that the defendant administered to plaintiff "a dose of medicine," and that "having administered said medicine, plaintiff being then and there sick and in bed, under the influence of said medicine, became and was unconscious," implies, if it does not state, that the unconsciousness was a result of the medicine; and that it follows that there can be no recovery unless the cause of her unconsciousness is proved as charged. Admitting his construction of the petition, is respondent's conclusion correct?

The rule is that proof is only required of those allegations necessary to a recovery, and that those un-

necessary to that end may be eliminated as surplusage. [Mehan v. St. Louis, 217 Mo. 35, 46; Frederick v. Allgaier, 88 Mo. 598, 603-4; Smith v. Fordyce, 190 Mo. 1.] The rule more specifically stated is that where a good cause of action is well stated in the pleading, all additional averments consistent therewith, whether by way of inducement, explanation or additional particulars, may be rejected as surplusage, and a recovery may be had upon proof of the essential facts remaining. The only exception to this rule is that in those special cases when the law permits a recovery upon the statement of a legal conclusion, as upon the general allegation of negligence in a suit by a passenger against the carrier, if the plaintiff, instead of relying upon this right, undertakes to state the specific facts constituting his cause of action he will be held to have abandoned his general statement. This exception, it will be seen, is more apparent than real, for the pleading, so constructed and construed will then be subject to the rule we have stated. The allegation in this petition that the plaintiff was asleep is as clearly a statement of fact as would be the allegation that she was dead. While the cause of her slumber as well as the cause of her death might in a proper case become an important question for adjudication, it is not, as we have seen, important in this case. The giving of this instruction was prejudicial error.

III. The respondent says that the judgment ought to be permitted to stand because, underlying and controlling all other questions in the case is the fatal fact that the testimony of the plaintiff is of such a character that had the verdict and judgment been for the plaintiff, it ought not to be permitted to stand. He says that for that reason the case should not have been submitted to the jury.

Female's After-
Agreement to
Remain Silent:
Her Testimony.

We are not usually disposed in such cases to attach much importance to the failure of a woman to vindicate her own virtue and the majesty of the law by raising the hue and cry to announce her shame and humiliation. We can understand how the natural modesty of a good woman may impel her to hide so foul a thing in her own soul, suffering the pain and humiliation alone, rather than to endure the mortification of displaying it in the arena the law has provided for such exhibitions, to curious crowds that in her outraged imagination would look upon her as polluted rather than wronged. This case, however, presents no such difficulty. According to her own relation of the affair the plaintiff, as soon as the matter was presented to her in that light, considered the financial features of the situation, with the result that she agreed, in consideration of money promised her by the one who had wronged her by the commission of a felony, to conceal the crime, and thereby herself became guilty of a felony. [R. S. 1909, sec. 4360.] When the money was not paid and he intimated that he did not intend to pay it, she said to him, "I am going to tell on you." This, she says, brought him to such a realizing sense of the trouble he was in that he followed her, and caught her by the arm in the door, and paid her the sixty dollars. She then wiped the tears from her eyes on her wrist and departed. The fact that Dr. Lavender, in charging her with robbery, founded his accusation upon a threat to shoot rather than a threat to accuse him of a felony, under section 1895, Revised Statutes 1899, may not be corroborative of his version of the affair as against hers, but it at least illustrates that queer perversity of human character which sometimes prefers pure invention to equally available facts. We know of no law which disqualifies Mrs. Wessel as a witness by reason of these circumstances, or prevents the jury from considering her testimony for what they may think it worth, but even

should it require corroboration, about which it is entirely unnecessary to express an opinion, it finds it in the fact that the Doctor paid sixty dollars on a fair statement of the ground on which this suit is founded, and took upon himself the burden of explaining it.

On the ground stated in discussing the defendant's eighth instruction we are constrained to reverse the judgment of the trial court, and to remand the cause for a new trial. *Blair, C.*, concurs.

PER CURIAM.—The foregoing opinion by BROWN, C., is adopted as the opinion of the court. All the judges concur, *Woodson, P. J.*, in result.

C. A. FLEMING, Appellant, v. CITY OF MEXICO.

Division One, December 2, 1914.

MERCANTILE AGENT: Interstate Commerce. A mercantile agent who, as the agent of a foreign corporation, goes from house to house and obtains orders from residents for coffees, teas and groceries, and sends them to his principal in another State, which fills them by making up separate packages for each order, and sends them to said mercantile agent, who delivers them in the unbroken package to the persons who have ordered them and receives the money therefor, which he transmits to his principal, is engaged in interstate commerce; and an ordinance which seeks to punish him for engaging in such business without a license, is unenforcible as to him or others engaged in a like business. [Following *Jewel Tea Company v. Carthage*, 257 Mo. 383.]

Appeal from Audrain Circuit Court.—*Hon. James D. Barnett*, Judge.

REVERSED AND REMANDED (*with directions*).

Philemon S. Karshner and *F. R. Jesse* for appellant.

(1) It is a principle established beyond controversy that "the negotiation of sales of goods that are

in another State for the purpose of introducing them into the State in which the negotiation is made is interstate commerce" and is protected from local interference, burdens, or tax, by clause 3, section 8, of article 1, Constitution of the United States, which provides, that, "Congress shall have power—to regulate commerce with foreign nations and among the several States and the Indian tribes." That the appellant was engaged in interstate commerce when he solicited the orders in the city of Mexico is not open to question. *Robbins v. Taxing District*, 120 U. S. 489; *Corson v. Maryland*, 120 U. S. 502; *Laloup v. Mobile*, 127 U. S. 640; *Asher v. Texas*, 128 U. S. 129; *Brennan v. Titusville*, 153 U. S. 289; *Cardwell v. North Carolina*, 187 U. S. 622; *Rearick v. Pennsylvania*, 203 U. S. 507. (2) The delivery of goods to a buyer at his residence in one State, that have been sent in pursuance of contract by a seller in another State, is interstate commerce and subject to no state or local burdens. The right to solicit orders implies the obligation and the right to deliver the goods and the means by which the delivery is made cannot be controlled by the States. *Bowman v. Railroad*, 125 U. S. 479; *State v. Freight Tax*, 15 Wall. 275; *Ferry Co. v. Pennsylvania*, 114 U. S. 203; *Caldwell v. North Carolina*, 187 U. S. 622; *Tea Co. v. Carthage*, 257 Mo. 383.

A. C. Whitson for respondent.

STATEMENT.

C. A. Fleming was a sales agent of the Citizens Wholesale Supply Company, an Ohio corporation, doing business at Columbus, Ohio. He was arrested upon an affidavit filed in a police court in Mexico, Missouri, for an alleged violation of an ordinance of that city, enacted on the 29th of June, 1909, which imposed a

fine of not less than ten, nor more than one hundred dollars, on any person acting as "mercantile agent" without the payment of a license fee of two dollars per day, and a fee of fifty cents to the city clerk for issuing the license. [Am. Rev. Ord. City of Mexico of 1893, sec. 57, 57a, 57b.] He was convicted and fined the maximum penalty in the police court, and the same amount upon the hearing of his appeal in the circuit court of Audrain county, from which judgment he has appealed to this court for that his defense was immunity from such prosecution under the commerce clause of the national Constitution.

On the trial in the circuit court, by admissions of the parties of record and by suppletory evidence, the facts were shown to be, to-wit: "For the purposes of this trial it is admitted that on the 6th day of April, 1910, the said Citizens Wholesale Supply Company, a corporation doing business in the State of Ohio, sent its agent, C. A. Fleming, the defendant, from place to place, and from house to house, in the city of Mexico, where said Fleming took orders for tea and groceries and other articles for persons who ordered them for use in their families, and who were not dealers in coffee, groceries and such articles; the said goods were not at the time delivered, but were delivered in the future; and at the time the orders were taken the goods ordered were at the principal place of business of the Citizens Wholesale Supply Company in Columbus, in the State of Ohio."

The testimony was further to the effect that, when the defendant's principal (Citizens Wholesale Supply Company) received from him the orders which he had taken, it packed the goods to fill such orders in separate packages, and when enough had been received for that purpose, assembled these separate packages in large boxes and barrels and shipped them to its agent, the defendant, C. A. Fleming, by a bill of lading, addressed to him at the railroad station in Mexico, Mis-

souri; that the defendant received the goods from the carrier, took them to a room at his hotel and opened the large boxes and barrels, and took out of them the separate packages of the proper size and quantity, to fill the orders of the respective purchasers, and with the aid of said orders (which had been transmitted to him of even date by registered letter or express) delivered said goods in accordance therewith to the individual purchasers; that no goods were sent to defendant by the company except to fill specific orders taken by him in this way, and no goods were sold or delivered by him except in fulfillment of said orders; that when the deliveries were thus made, the defendant collected the money and remitted it to his principal; that it was while engaged in these duties that defendant was arrested and fined in the police and circuit courts as above stated.

OPINION.

BOND, J. (after stating the facts as above).—Upon the admitted facts, and those shown on the trial, it is impossible to distinguish the instant case from that of the Jewel Tea Company v. City of Carthage, 257 Mo. 383. The doctrine of that case is set forth in paragraph 2 of the opinion therein, and demonstrates that the transaction in question in this case falls within the purview of the provision of the Constitution of the United States, vesting the complete and paramount power in Congress “to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.” [U. S. Constitution, art. 1, sec. 8, ch. 3; *Houston, E. & W. Tex. Ry. v. United States*, 234 U. S. 342; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1. c. 222.] The authorities and reason for that view are stated *in extenso* in the opinion in Banc in that case, and must control the disposition of the present case. Our conclusion is, that the ordinance referred

to in the aforesaid statement was and is inoperative so far as the appellant (defendant below) or others engaged in like business are concerned.

The respondent did not avail itself of the leave granted until the 24th of October, to file a brief on this appeal, nor made any oral argument at the time of its submission. We have therefore been deprived of the benefit of its theory of the law, applicable to the facts shown in this record, as we were also without any similar aid on the part of respondent in the case of the Jewel Tea Co. v. City of Carthage, *supra*.

The judgment herein is reversed and the cause remanded with directions to dismiss the proceeding against appellant. All concur.

CHARLES LOUIS TREFNY, Appellant, v. WILLIAM EICHENSEER et al.

Division One, December 2, 1914.

1. **MISJOINDER: Several Causes.** The statute (Sec. 1795, R. S. 1909) provides that several causes of action may be united in the same petition, whether they be legal or equitable or both, where they arise out of the same transaction or transactions connected with the same subject of action, but the causes so united must all belong to one of the classes mentioned in the statute, and "must affect all the parties to the action."
2. **————: ————: Different Counts: One Against All: The Other Against Some.** Where there are two counts joined in a petition, the petition is demurrable unless each count affects all the parties to the action. Where the first count of a petition is a bill in equity seeking relief against five defendants in clearing title to real estate and preventing threatened execution sales calculated to wrongfully cloud the title, charging a conspiracy among them designed and intended to depress the value of plaintiff's property, and to extort money from him, and asking for a trial before the chancellor, and the second count, confessedly arising out of the same transaction, asks for damages against three of the same defendants for acts done in furtherance of a malicious conspiracy to injure

plaintiff, and demands a trial by jury after plaintiff's equitable relief prayed for in the first count has been granted, the petition is demurrable, in that it is violative of the statute which declares that different causes of action united in the same petition "must affect all the parties to the action."

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

AFFIRMED.

F. W. Imsiepen and *Andrew J. Haverstick* for appellant.

A complaint will be regarded as stating but one cause of action although it may pray for many and various forms of relief where they are all germane to the vindication of a single primary right." *Kelly v. Hurt*, 61 Mo. 463; *Lincoln v. Rowe*, 51 Mo. 571. "Since a bill is single and does not misjoin different causes, so long as its object is the complete enforcement of one general right, the fact that different defendants have distinct interests or liabilities with reference to that right does not render a bill multifarious." *Kelly v. Hurt*, 61 Mo. 463; *Lincoln v. Rowe*, 51 Mo. 571; 16 Cyc. 252, note 16; 1 Story, *Equity Jur.* (9 Ed.), p. 377, sec. 400. "If the bill presents a common point of litigation decisive of the entire matter, it is not multifarious, although the interests or liabilities of defendants are unconnected except by such common question." *Martin v. Martin*, 13 Mo. 36. "A bill is not multifarious merely because each defendant's interests do not extend to all the matters of a bill with a single general object. It is sufficient if each defendant is interested in some matter involved which is connected with the others." 16 Cyc. 251, note 34; *Truss v. Miller*, 116 Ala. 494; *Booth v. Stamper*, 10 Ga. 109; *Worthy v. Johnson*, 8 Ga. 236; *Lenz v. Prescott*, 144 Mass. 505; *Curran v. Campian*, 85 Fed. 67.

George W. Lubke, George W. Lubke, Jr., and Frank X. Hiemenz for respondents.

We have a petition containing two counts attempting to state two causes of action, growing out of the same state of facts, one equitable and the other legal, the first of which affects all the parties to the suit and the second of which affects only a part of the parties to the suit. That this is not permissible under the statute is well settled. The statute permits as many causes of action, legal or equitable, or both, arising out of the same transaction to be joined in one petition only in the event that they affect all the parties to the action. The causes of action attempted to be stated in the petition in the case at bar, while they grow out of the same state of facts, do not both affect all the parties to the action and therefore they cannot be joined in the same petition. R. S. 1909, sec. 1795; *Beattie Mfg. Co. v. Gerardi*, 166 Mo. 156; *Liney v. Martin*, 29 Mo. 28; *Doan v. Holly*, 26 Mo. 186.

LAMM, J.—Cast below on several joint and separate demurrers, plaintiff stood on his petition, refused to plead over, suffered judgment and appeals.

The demurrers on which plaintiff was made to go out of court have a common ground reading: "That several causes of action have been improperly united" in said petition. That is a statutory ground of demurrer—the fifth. [R. S. 1909, sec. 1800.] Our statutes prescribe rules for uniting causes of action in the same petition. One of them is that a "plaintiff may unite in the same petition several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of: First, the same transaction or transactions connected with the same subject of action. . . . But the causes of action so united must all belong to one of these

classes, *and must affect all the parties to the action.*" [R. S. 1909, sec. 1795.]

Defendants maintain that the petition is obnoxious to the statutory rule just announced; hence the demurrers being levelled at that contention, it presents the single question in the case. Attend to the record:

Plaintiff, claiming to own certain valuable real estate in the city of St. Louis, filed his bill in equity against certain named defendants (to-wit, four, Eichenseer, Ammen, Charles William Trefny, and Nolte, sheriff) and in aid of the bill sought and got against all the defendants a temporary injunction before the return term, restraining an alleged wrongful execution sale of said real estate. To that bill he added a second count at law which prayed damages, \$5000 compensatory, and \$5000 by way of smart money for malicious wrongs in the premises. This count at law in set terms involved only *two* of the defendants, Eichenseer and Ammen.

Presently, before the return term, he filed what he called his "first amended and supplemental petition," bringing in a new party defendant, Eyerman, and asked a temporary injunction against him to restrain the sale of the same real estate under another execution and prayed additional relief not material here. In this "supplemental and amended petition" he added against three of the defendants, to-wit, Eichenseer, Ammen and Eyerman, a count in damages at law on the same transaction pleaded in the first or equity count and on transactions connected with the same subject of action, laying his damages at \$14,000, divided between compensation and smart money half and half. As we understand this record, a temporary injunction issued against the new party, Eyerman, and sheriff Nolte.

Presently, at the return term plaintiff dismissed one of the then defendants, Charles William Trefny, and by leave filed what he called a "second supple-

mental petition" and by the same token brought in a new party, Pearl Byrnes. This latter petition is the one challenged by the demurrers and thereby plaintiff plants himself upon the grounds where he wishes to pitch his forensic battle. It is too long to copy and we give our estimate of it, thus: It is in two counts—the first, a copious bill in equity seeking relief in clearing title to real estate and preventing threatened sales calculated to wrongfully cloud the title; the second, a suit at law for damages. The first brings forward the various allegations in the former petitions, connects Eichenseer, Ammen and Eyerman as co-conspirators to a common wrongful intent and design and adds new averments connecting Pearl Byrnes with the subject of the cause of action. As said, in its general scope the object of the bill was to enjoin certain levies and threatened sales under executions against the father of plaintiff (said Charles William Trefny), which said executions were levied as hereinbefore mentioned on valuable real estate claimed by plaintiff in the city of St. Louis. It runs on the theory these levies were wrongful and malicious, the product of conspiracy and were intended to depress the value and clog the alienation of plaintiff's property by casting a cloud on his title, etc., etc., and to extort money from him. The bill further averred that defendants had been successful in making one sale under a similar execution and that defendant Byrnes had bought at such sale for and on behalf and as a "tool of" certain of her codefendants named and received and recorded a sheriff's deed purporting to convey the property as that of a third person, to-wit, defendant's said father. The bill also seeks to remove the cloud of that sale and the record of that sheriff's deed and asks general relief. The second count confessedly arises out of the same transaction or transactions connected with the same subjects of action and asks \$10,000 in damages for acts he characterizes as libels on his title, acts done in furtherance

of a malicious conspiracy to injure plaintiff. That there may be no question that such is the fact, plaintiff in his brief does not deny that his damages arise out of the same transaction complained of in his first count, and in his petition he solemnly demands separate trials on the two counts; the first to a chancellor, and the other to a jury after plaintiff's equitable relief in the first count has been awarded.

Now, the parties against whom equitable relief is sought in this challenged petition are Eichenseer, Ammen, Eyerman, Nolte and Byrnes, while in set terms (speaking *ipsissimis verbis*) the parties to the count at law are the three first, to-wit, Eichenseer, Ammen and Eyerman.

On such a record it is clear that the ruling on the demurrer was well enough, if, by heeding, we give effect to the command of the statute, *supra*, to-wit, that "the causes of action so united . . . must affect all the parties to the action," and to the construction put upon it by this court.

With praiseworthy industry counsel for appellant have marshaled an array of authorities which, on one or another angle, lend countenance not only to the right of plaintiff to specific relief in equity, but to damages at law as well, on facts such as alleged in his pleading. Now, if opposing counsel were attacking the petition for that it did not state a cause of action, then these authorities would stand to be reckoned with; but they do not do that. Instead they attack the petition in another quarter by pointing to one statute making the improper joinder of causes of action in the same petition a ground of demurrer, and by pointing to another denouncing a joinder unless the causes so joined "affect all the parties to the action." The trial judge was charged with the duty of enforcing those statutes on demurrer and learned counsel were charged with the duty of complying with them in bringing his suit. So far as we know it has always been the rule of de-

cision in Missouri, in construing the statutes in judgment, that A could not join a cause of action against B, C and D in one count and against C, or C and D in another. "Notwithstanding the great liberality of the present practice act in relation to the joinder of actions, it is conceived that there is nothing contained in it which gives the slightest sanction to the joining of actions in which the defendants are not the same, not in part but in the whole." [Per SCOTT, J., in Doan v. Holly, 25 Mo. l. c. 359.] Judge SCOTT puts the reason of the rule upon the possible liability for costs in the Doan-Holly case, and the oppression springing from that view of it. In Liney v. Martin, 29 Mo. 28, the same conclusion was reached on the construction of the wording of the statute without attempting to establish or aid the rule by referring to reasons underlying it. This course, in dealing with statutes, is a sound rule of construction where there is no ambiguity in language—the applicable maxims being: *Ita lex scripta est*; and the other, The will (of the lawmaker) stands in place of reason—*Stat pro ratione voluntas*. So, in Beattie Mfg. Co. v. Gerardi, 166 Mo. l. c. 156, it was held (on the authority of the Doan-Holly and Liney-Martin cases) that where there are two counts joined in a petition, the petition is demurrable unless each count affects all the parties to the action. In Scott v. Taylor, 231 Mo. l. c. 668, the doctrine of the Beattie-Gerardi case, *supra*, was construed to be "that the joinder of matters not affecting all of the parties is impossible." In Mann v. Doerr, 222 Mo. l. c. 12, the question was in judgment and the reason underlying the statutory provision was said to be the confusion entering through any other door and the common burdens of defense, inequitably put upon litigants.

By parity of reasoning, in the latter aspect of the case, the reasons underlying the rule against multifariousness are in point. To illustrate: Under our code there can be but one final judgment, no matter how

many issues are framed in several counts. "The judgment upon each separate finding shall await the trial of all the issues." [R. S. 1909, sec. 1971.] Agreeable to that theory is section 2097, *Ibid.* Now, when different causes of action are bundled in one petition in separate counts, which do not affect all the parties, it results that hazards, inconveniences and other burdens are put upon litigants in the matter of appeals and steps incident to appeals, on points where on final judgment the shoe pinches one or another litigant or one or another group of litigants which are unfair and oppressive. Assuming (as is the case) there can be no appeal except from the final and only judgment on all counts, why should parties not interested in the second count, be bound to dance attendance or cool their heels in court awaiting the vicissitudes or delays in final judgment on the second count over which they have neither concern nor control, before they can take steps to be relieved from an adverse finding and judgment on the first count? If all the parties are the same in both, this sharp inconvenience and hazard are absent. They become but usual incidents to the litigation. Otherwise, otherwise. Peradventure, in litigation the eye of the lawmaker has not rested exclusively on the welfare and convenience of *plaintiffs*. It has blandly rested as well upon the welfare and convenience of *defendants*. Why not? Plaintiffs go into court of choice; defendants are lugged in—pulled in by the ears. Agreeable to those views is the reasoning of such cases as *Chaput v. Bock*, 224 Mo. 73, and *Peniston v. Pressed Brick Co.*, 234 Mo. 698, which, not unprofitably, the curious may consult.

Each and all the premises in mind, the judgment should be affirmed. It is so ordered. All concur; *Bond, J.*, in result.

ST. LOUIS LODGE NO. 9, B. P. O. E., Appellant, v.
EDMUND KOELN, Collector.

Division One, December 2, 1914.

TAXATION: Constitutional Question: Elk's Club Rooms Not Exempt. Premises owned by the Benevolent and Protective Order of Elks, and used for the entertainment and refreshment of the members and their guests, are not exempt from taxation under the provisions of Sec. 6, Art. 10, of the Constitution, exempting lots used exclusively for purposes purely charitable.

Appeal from St. Louis City Circuit Court.—*Hon. George C. Hitchcock*, Judge.

AFFIRMED.

Brownrigg & Mason for appellant.

Edward W. Foristel and *Frank H. Haskins* for respondent.

BROWN, C.—This is a suit to cancel a tax bill issued against a lot in the city of St. Louis for city and school taxes for 1912. The lot is owned by the plaintiff and occupied exclusively by a building containing its lodge room, a hall used by the members and their wives, daughters and friends for entertainments such as dancing, card or other social parties, a rathskeller, where meals and other refreshments, including liquors, are served to the members and such guests as by the rules of the lodge they are permitted to entertain there, and an auditorium in which vaudeville and similar entertainments, including on one occasion a boxing exhibition, are given for the entertainment of the members and their guests. There are also billiard and card rooms for similar use. No admission fee to the entertainments is charged.

Elk's Club
Rooms Not
Exempt from
Taxation.

The general constitution of the order to which the lodge belongs states that it is established "to inculcate the principles of charity, justice, brotherly love and fidelity; to promote the welfare and enhance the happiness of its members; to quicken the spirit of American patriotism; to cultivate good fellowship; to perpetuate itself as a fraternal organization." The by-laws of the plaintiff lodge provide for the relief of destitute and unemployed Elks to the extent of ten dollars per week out of the funds of the lodge. A liberal construction has been given to this rule and by reason of the fortunate rarity of destitute Elks it has been tacitly extended to cover general charities without limit as to the amount, and in winter, and especially at Christmas time, large sums have been raised from the voluntary contributions of members to be dispensed for such purposes, and for Christmas gifts to children who, it is presumed, would not otherwise be able to partake of the pleasures of that blessed season. Their entire lodge fund, arising from membership dues and including the profits upon refreshments, except the sinking fund provided for the payment of the amount unpaid upon the property in question, has been devoted to these charities.

The lodge is incorporated under the State law providing for the incorporation of benevolent, religious, scientific, educational and miscellaneous associations.

The only question presented for our consideration is whether or not the property in question is exempt from these taxes because it is used exclusively for purposes purely charitable within the meaning of that expression as used in section 6 of article 10 of our State Constitution.

In construing this same section this court recently said: "It must be conceded to the state that whether a tax-exempting clause be viewed from the standpoint of the State down to the people, or from the standpoint of the people up to the State there must be unbending

and inviolate rules which as sure words of the law are always to be reckoned with; and those rules (from the standpoint of the State) are that an abandonment of the sovereign right to exercise the vital power of taxation can never be presumed. The intention to abandon must appear in the most clear and unequivocal terms (*Pacific Railroad v. Cass County*, 53 Mo. l. c. 27); and from the standpoint of the people they are that equality is equity in taxation." [*State ex rel. v. Johnston*, 214 Mo. 646, 662.] The same rule is distinctly stated in the cases cited in that opinion, as well as in *State ex rel. v. Casey*, 210 Mo. 235, 248. It is a just and reasonable one, and whatever may be the doctrine of the adjudications in other jurisdictions, must be taken as the well-settled law of this State.

There can no question as to the charitable character of the defendant lodge, nor of its disposition in that respect. While the property is used as the meeting place of the lodge where all its regular business is transacted, it also affords to the members and their families, free of cost, the most liberal facilities for social enjoyment and the entertainment of their guests, and to the unfortunate bachelor member and transient brother, for compensation, something like the culinary and table advantages of home. The surplus of its lodge funds, whatever that may be, together with large sums voluntarily contributed by its members, is dispensed, through the activities of the lodge organization, in the relief of the needy. Were the virtues of human sympathy and helpfulness grounds for the exemption of one's property from the common burden of taxation, the plaintiff would stand upon firm ground while urging its claim for relief. There are, however, others whom we have enjoyed the pleasant privilege of knowing, who might stand upon the same ground and urge a similar claim. For them the home has not only been the instrument and abiding place of their own personal comfort, but they have opened its doors to helpless and

deserted or orphaned children whom they have nurtured and educated to be good and useful citizens of the State, and have spent their income, and in some cases more, in dispensing aid to the destitute and suffering. Perhaps one of the brightest virtues of these has been the instinctive patriotism evident in their willingness to share in the burden assumed by the government in protecting them in the life they have chosen and in educating their children.

It is evident that the constitutional exemption before us has no reference to the character and activities of the owner except in so far as those activities relate to the use of the property. For instance, the same sentence of the Constitution we are considering exempts from taxation property used exclusively for religious worship; yet it is evident one might have family worship in his own residence from morning until night, except at such times as he should step out for a few moments to evangelize his neighbors, without changing in the least the character of the property as his residence, or exempting it from taxation on the ground that it was used exclusively for religious worship. The worship would be an incident to the residence in the property of a pious, God fearing man, given to the observance of such duties. If on the other hand the building were a church, devoted to public worship, and the owner should reside in it in the capacity of pastor in charge and caretaker of the premises, the condition would be reversed; for the occupation would be an incident to and a part of the religious use. This distinction is clearly illustrated and interestingly discussed in *State ex rel. v. Johnston*, *supra*, and cases cited therein at pages 663 et seq.

This house is used, as the plaintiff's secretary tells us in his testimony, for lodge and club purposes, and seems to be well and liberally calculated for that use. The constitutional exemption requires that the property be "exclusively" used for purposes "purely"

charitable. This "exclusive" use implies that all other uses be excluded. This exclusion naturally applies to vaudeville, boxing, dancing, billiards and cards for the amusement of the owners. It might, under some circumstances, be said that all these things may be used to raise money for charitable purposes; but here the shoe is on the other foot. We are told in the testimony that these things are all *free*. No fee is charged for entrance to the shows, or to the dances, or for billiards or cards. These must be paid for out of the funds of the lodge, and consequently constitute uses not incidental but paramount to the charities. When the lodge has used the hall for a dance, and has paid the fiddler, then charity may come for the crumbs. The exempting use must also be "purely" charitable—charity which, according to Webster, is *unmixed* with any other element. Charity is not a promiscuous mixer. Here she modestly stands outside or goes her way and waits; waits until the plaintiff has finished using the spacious and comfortable rooms for the pleasure of its members; waits until the curtain has fallen upon the last scene of the vaudeville performance on the stage; until the dancers have tired and gone home; until the billiard rooms have been deserted to the markers; until the plaintiff has paid the cost of its own entertainment, and goes out and finds her, and hands her whatever it may have left in its pocket. She gets not the *use* of the premises, but what remains of income to the owners after they have used it in carrying out the injunction of their organic law, by promoting their own welfare, enhancing their own happiness, and cultivating their own good fellowship among themselves. Like the Supreme Court of Wisconsin in *Green Bay Lodge v. Green Bay*, 122 Wis. 452, we do not find the maintaining of a club house to be a purely charitable use. Were this true, as that court remarked in its opinion, "then any number of men may organize themselves into a corporate body to provide these privileges and

benefits for themselves and their guests and claim the exemption of the statute.”

After what we have said it is unnecessary to notice further the Utah case of Salt Lake Lodge v. Groesbeck, 40 Utah, 1, in which it was held that a law exempting property of this character from taxation should be liberally construed. We are satisfied with our own rule in that respect.

The judgment of the circuit court for the city of St. Louis is affirmed. *Blair, C.*, concurs in result.

PER CURIAM.—The foregoing opinion by BROWN, C., is adopted as the opinion of the court. All the judges concur, *Bond, J.*, in result.

ALFRED MUNYON v. S. P. HARTMAN, Appellant.

Division One, December 2, 1914.

1. **SPECIFIC PERFORMANCE: Defective Title.** Where the agreement for the exchange of lands was that each party should furnish an abstract of title to the property to be conveyed by him, showing a good title in him, and if the abstract failed to show a good title in him then he should make such corrections as might be necessary to perfect it, plaintiff cannot have a decree for specific performance unless he has a good title.
2. ———: ———: **Admission of Defects.** The institution of a suit in the circuit court and at the same term, by plaintiff, to quiet title to a part of the land for which he seeks a decree of specific performance of a contract to convey to him, is a solemn admission of record that he does not own a good title to the entire tract, and is a bar to his right to a decree for specific performance, where the contract to convey calls for a good title.

Appeal from Linn Circuit Court.—*Hon. John P. Butler*, Judge.

REVERSED AND REMANDED (*with directions*).

Bresnehen & West for appellant.

(1) The contract sued on required the plaintiff to furnish an abstract to his land showing a good title in him; this requires him to have a record title, one that can be shown by an abstract, and requires him to furnish an abstract showing that he has such title. *Thompson v. Dickerson*, 68 Mo. App. 535; *Birge v. Bock*, 44 Mo. App. 69; *Bruce v. Williams*, 102 Mo. App. 384; 6 *Ballard on Real Property*, secs. 15-17; *Maupin on Marketable Title to Real Estate*, sec. 164; 1 *Am. & Eng. Ency. Law*, 214. (2) The decree of court undertaking to quiet plaintiff's title is not shown in the abstract. He agreed to furnish an abstract showing a good title, and without this decree his abstract is incomplete and fails to show any correction of the defects attempted to be cured by that decree. The court erred in decreeing specific performance of the contract sued on without proof of the plaintiff's title. *Luckett v. Williamson*, 31 Mo. 54; *Birge v. Bock*, 24 Mo. App. 330.

C. C. Bigger for respondent.

(1) Under the contract sued on, plaintiff was only required to furnish to defendant a reasonably good title to the farm, and was not bound to establish his title by the record alone, but could supply defects in the record title by evidence of facts not of record, so as to make the title good and marketable. *Scannell v. Am. Soda Fountain Co.*, 161 Mo. 606; *Greffet v. Willman*, 114 Mo. 106; *Birge v. Bock*, 44 Mo. App. 69. (2) The decree of the circuit court of Linn county had the effect of quieting the title and barring any claim to plaintiff's farm or any part thereof, on the part of the heirs of George M. Taylor, deceased, Annie M. Langlie or the Marceline Coal Mining and Prospecting Company. (3) The small portion of the farm occupied by a public

road, and the fourteen-hundredths of acre taken off by the Santa Fe Railway Company, should not prevent a decree of specific performance. All plaintiff was required to do, was to convey to defendant the premises, substantially, contracted for. *Secret Service Co. v. Gill Mfg. Co.*, 125 Mo. 156; *Kilpatrick v. Wiley*, 197 Mo. 169.

WOODSON, P. J.—This suit was instituted in the circuit court of Linn county, by the plaintiff against the defendant, to specifically enforce a written contract for the exchange of a certain farm, subject to two certain deeds of trust, for a residence, a homestead lot, in the city of Brookfield, all situated in said county. A trial was had before the chancellor, and after hearing all of the evidence a finding of the facts and a decree of the court were made and entered in favor of the plaintiff, from which, after taking the proper preliminary steps, the defendant duly appealed the cause to this court for review.

The pleadings need not be set out or commented upon, for the reason that they are not assailed in any manner; thereby the concession may be drawn that they are sufficiently specific and comprehensive to cover and present the issues of fact and propositions of law presented to this court for determination.

The substance of the contract may be briefly stated as follows:

The plaintiff and defendant agreed that the former should exchange his farm, consisting of two hundred and sixty acres, subject to two deeds of trust, one to secure a note of \$3500 and the other for \$3950, both of which the defendant agreed to assume; and the house and lot of the defendant situated in Brookfield was to be taken by the plaintiff in full exchange for his equity in the farm.

The contract was dated September 23, 1908, and provided that each party should within twenty days

from that date furnish an abstract of title to the property to be conveyed by him, showing a good title in him, and if the abstract fails to show good title then such party should make such corrections as might be necessary for that purpose. The defendant was to pay to the plaintiff interest on the \$3500 deed of trust from January 1, 1908, and on the \$3950 deed of trust from September 23, 1908, until satisfied. The plaintiff was to deliver possession of the farm on January 1, 1909; and defendant was to deliver possession of the Brookfield property on the same date, but was to pay rent thereon from October 1, 1908, to January 1, 1909, at \$50 per month.

The defendant furnished the plaintiff with an abstract of title to his property within a few days after the contract was executed, but the plaintiff's abstract was not delivered until November 11, 1908, some thirty days after the expiration of the time it was to have been delivered under the terms of the contract. No objections, however, it seems, were made to the non-delivery of this abstract in time; and, therefore, that fact will receive no further consideration at our hands.

No objection was made to the abstract furnished by the defendant, but the defendant, on December 18, 1908, made many written objections to the one furnished by the plaintiff.

On January 1, 1909, the plaintiff met the defendant in Brookfield and tendered him a deed to the farm and the abstract which he had theretofore submitted to him for examination, but the defendant refused to accept the same on the ground that the abstract failed to show a good title, as required by the contract.

Without further ado, the plaintiff instituted this suit.

If I correctly understand the record, it shows that about one hundred and twelve different transfers of this property, or some portion thereof, had been made since the title thereto emanated from the United States.

The contract of exchange and much other evidence were introduced.

Counsel for defendant presented some fifteen specific objections to various numbers of those transfers (each being represented by a number), and assigned those, as well as some five others, as grounds for a rehearing to the trial court, all of which were overruled, and a judgment specifically enforcing the contract in favor of the plaintiff was rendered, as before stated, also for \$750 for rent of the Brookfield property, etc., when all of the evidence, outside of the contract of exchange, tended to show that its monthly rent was only \$20 to \$22.50.

At the same term of the Linn Circuit Court, at which this suit was brought, the plaintiff also instituted a suit therein against Anna M. Langlie and — Langlie, her husband, the unknown heirs, devisees, grantors and assignees of George M. Taylor, deceased, and the Marceline Coal Mining and Prospecting Company, a corporation, defendant, to quiet his title to certain portions (some ten or fifteen acres, the exact number not having been made clear) of the two hundred and sixty acres of land in controversy.

The defendants in the latter suit being non-residents, were notified of the pendency of the suit by publication, the validity of which is challenged by counsel for defendants.

It is charged by the defendant that the plaintiff did not have a good title to the two hundred and sixty acres of land he agreed to exchange with the defendant for his house and lot in Brookfield, and the evidence conclusively shows that said charge was true. Not only that, the institution by the plaintiff of the suit before mentioned to quiet his title to certain portions of said land, is a solemn admission of record, in the same court in which this suit was brought, that he

Specific
Performance:
No Good
Title Shown.

did not own a good and clear title to that entire two hundred and sixty acres.

This evidence and the admission of the plaintiff is a perfect bar to his right to a recovery in this case. [McQuary v. Missouri Land Company, 230 Mo. 342, l. c. 364; Rector v. Price, 1 Mo. 373.] The latter case is the leading case in this State regarding the legal proposition under consideration, and has been approved many times in subsequent adjudications. The facts of those cases are not nearly so strong in favor of the defendants' contention, as are the facts of this case.

These views render it unnecessary to consider the numerous other legal propositions presented for determination, since this view of the case fully disposes of it.

For the reason stated, the judgment of the circuit court is reversed, and the cause remanded with directions to dismiss the plaintiff's bill.

All concur.

GEORGE SANG v. CITY OF ST. LOUIS, Appellant.

Division One, December 2, 1914.

1. **TESTIMONY: Credibility: Theory of Expert: Contradicted by Laymen.** The credit due the testimony of lay witnesses directed to establishing a fact, as against the advisory theorizing of experts, is always for the jury, not the court. It cannot be held that one of plaintiff's testicles was not driven by the accident up into his abdomen and remained there, simply because the doctors testified they never saw or read of an accident of the kind, and that the size of the usual canal, protected, as it is, by muscular rings, excludes the idea that the testicle could be driven by force from nature's sack up and along this canal, where unimpeached lay witnesses, including plaintiff's mother, testified that he was normal in this particular before the accident occurred and abnormal ever afterwards. The testimony of the experts was merely advisory, and the issue of fact was for the jury.

2. **EVIDENCE: Future Medical Attention.** Future expenses for physicians rest upon the same ground as the probable loss of future earnings. Where the evidence shows that a hernia and a complicated, compound, comminuted fracture of the leg between the knee and the ankle, resulted from the accident; the medical testimony is that the hernia, though reduced, is likely to recur at any time, and the trouble, when once the abdominal walls are ruptured and the intestines protrude, will with reasonable certainty recur from lifting or even ordinary labor; that the bones of the leg had been somewhat crushed and this crushing made the fracture a comminuted one; that some flesh and ligaments got between the parts of the compound fracture, and this was not discovered at first and caused suppuration and failure to knit, and after the bones were wired together it was several months healing, and at the trial, one year after the accident, there was still pain in the leg and tenderness in the wounded parts, there was sufficient evidence upon which to base an instruction authorizing a recovery "for any expense for medical services which the jury find and believe from the evidence plaintiff is reasonably certain to necessarily incur in the future by reason of his injuries and directly caused thereby;" for it is apparent from the evidence, that medical attention in the future will be reasonably certain to guard the situation or to reduce the recurring hernia or prevent strangulation.
3. ———: **Best Evidence.** No case calls for better evidence than the case admits of. Certain elements of damage may go to the jury though there is no line of testimony by which the fact of damage may be established with absolute certainty.
4. **NOMINAL DAMAGES: Request for Limit to Must Be Made by Defendant.** If there is some substantial evidence that future medical services will be necessary, and defendant is of the opinion that it is not sufficient to support a finding of actual damages, it is its duty, if it wishes to limit plaintiff's recovery to nominal damages on that score, to ask an instruction to that effect.
5. **NEGLIGENCE: Damages: Modest Sum: Instruction: Elements Unsupported by Evidence.** Where the evidence establish serious and permanent injuries and the verdict is for a modest sum and is absorbed by referring it to damages plainly suffered and about which there can be no speculation, it would be trifling with justice to suppose the jury allowed anything of substance on the issue of future medical services; and though the instruction permits a finding for future medical services, the verdict will not be reversed on the ground that the evidence fixes no definite amount or character of services to be rendered.

6. **NEW TRIAL: Newly Discovered Evidence.** To obtain a new trial on the ground of newly discovered evidence the party asking for it must show: first, that the evidence has come to his knowledge since the trial; second, that it was not owing to the lack of due diligence that it did not come sooner; third, that it is so material that it would probably produce a different result if the new trial were granted; fourth, that it is not merely cumulative; and, fifth, that the object of the evidence is not merely to impeach the character or credit of a witness. If the facts show that twenty-four hours before the close of the testimony, appellant was informed of the means by which to ascertain the names and residence of the absent witnesses and made no effort to obtain their attendance until after an adverse verdict was rendered, there was no diligence, and a new trial cannot be granted because of their absence.

Appeal from St. Louis City Circuit Court.—*Hon. Chas. Claflin Allen*, Judge.

AFFIRMED.

William E. Baird and *Truman P. Young* for appellant.

(1) The instruction allowing for the expense of future medical services was erroneous, for, (a) There was no evidence to support it. *Duke v. Railroad*, 99 Mo. 347; *Slaughter v. Railroad*, 116 Mo. 269; *Gibler v. Terminal Assn.*, 203 Mo. 208. (b) Damages will not be awarded to compensate for losses not yet experienced on mere conjectural possibilities. *Sutherland*, "Damages," p. 3644; *Joyce*, "Damages," sec. 260; *Voorhies*, "The Measure of Damages in Personal Injuries," pp. 70, 73; *Thompson*, "Negligence," secs. 7205, 7333; *Strohm v. Railroad*, 96 N. Y. 305; *Ross v. Kansas City*, 48 Mo. App. 440; *Wilbur v. Railroad*, 110 Mo. App. 689. (c) Damages covering expenses for future medical services will not be awarded in the absence of evidence indicating the reasonable likelihood that such expense will be incurred. *Minister v. Railroad*, 53 Mo. App. 276; *Page v. Canal Co.*, 34 App. Div. (N. Y.) 618; *McKenna v. Railroad*, 41 App. Div.

(N. Y.) 255. (2) The motion for a new trial on the ground of newly discovered evidence should have been sustained.

Joseph A. Wright and *Conrad Paeben* for respondent.

(1) The evidence fully justifies the instruction on damages as given. *Sotebier v. Transit Co.*, 203 Mo. 702; *Feeney v. Railroad*, 116 N. Y. 375, 5 L. R. A. 544; *Wolf v. Railroad*, 67 App. Div. 613, 74 N. Y. Supp. 336; *Turner v. Railroad*, 158 Mass. 267; *Moran v. Street Ry. Co.*, 74 N. H. 500, 19 L. R. A. (N. S.) 920; *Parker v. Transit Co.*, 108 Mo. App. 465; *Pentoney v. Transit Co.*, 108 Mo. App. 681; *Lackland v. Mining Co.*, 110 Mo. App. 634; *Mabrey v. Gravel Road Co.*, 92 Mo. App. 596. (2) Defendant asked no qualifying instruction on measure of damages, and therefore cannot now complain. *King v. St. Louis*, 250 Mo. 501; *State ex rel. v. Reynolds*, 257 Mo. 19; *Browning v. Railroad*, 124 Mo. 55; *Nelson v. Railroad*, 176 Mo. App. 423; *Jennings v. Appleman*, 159 Mo. App. 12; *Mabrey v. Gravel Road Co.*, 92 Mo. App. 596. (3) The trial court properly refused appellant a new trial on the ground of newly discovered evidence, because of a failure of diligence, and the evidence, at most, would be merely cumulative. At most, the ruling is within the exercise of a sound discretion. *State v. Nickems*, 122 Mo. 607; *State v. Welsor*, 117 Mo. 570; *Porter v. Stock Yards Co.*, 213 Mo. 372; *Dent v. Traction Co.*, 145 Mo. App. 70.

LAMM, J.—Suing for personal injuries and laying his damages at \$15,000, plaintiff had a verdict for \$4000. In due time defendant unsuccessfully moved for a new trial and appealed.

In outline the case is this: Plaintiff, twenty-seven years old, married and earning \$15 per week, at half-

past six p. m., October 3, 1910, during a great rain and while it was "pitch dark," was driving a one-horse beer wagon with a canopy top, on a paved street, Palm, in St. Louis, for the purpose of delivering a barrel and a keg of beer. Palm intersects Glasgow, then either a dirt road or partly clay and partly macadam. This intersection was not paved. In the street there was a hole, say, seven or eight feet long, two or three feet wide, and a foot or a foot and a half deep, at the time flooded with water, as were the two streets. Never having driven there before and knowing nothing of this hole, plaintiff at a sharp trot drove into it, whereby he was thrown over the footboard against the horse, and into the hole, both wheels of the wagon on his side running over his leg and the lower part of his abdomen. The existence and character of this hole in the street and in the line of travel for a length of time sufficient to give notice to the city are not questioned. In other words, the negligence of the city, disputed below, is no longer disputed on appeal. That the issue of negligence was properly submitted on the pleadings is not controverted. So, defendant's defense being contributory negligence, that issue was well submitted. So, the grave character of plaintiff's injuries is not disputed—the testimony showing a complicated, compound, comminuted fracture of the left leg between the knee and the ankle. It also showed a resulting hernia, a lump hard by the groin still existing at the trial. In addition thereto a singular thing happened on plaintiff's theory, to-wit, one of his testicles was driven by the accident up into his abdomen and remained there at the point of the hernia. The fact of the dislocated testicle is conceded. That it resulted from the accident is strenuously controverted by defendant. We shall revert further to the evidence in the body of the opinion.

Two questions, and only two, are to be ruled, to-wit:

(a) In plaintiff's instruction on the measure of damages are three propositions. The first allowed recovery for plaintiff's past pain of body and mind suffered and caused by his injuries and for such pain as the jury may find and believe he is reasonably certain to suffer in the future as a direct result. The second allowed recovery of expense for medical services and medicines necessarily incurred by plaintiff and for which he became obligated by reason of his injuries and directly resulting therefrom. (The testimony tended to show the rise of \$400 on this item.) Then follows this clause: "And for any expense for medical services which the jury find and believe from the evidence plaintiff is reasonably certain to necessarily incur in the future by reason of his injuries and directly caused thereby." The third allowed recovery for loss of earnings of his labor suffered by reason of his injuries or which he was reasonably certain to suffer therefrom in the future.

Appellant assigns error in giving that part of the instruction quoted above from the second proposition and such insistence is its first assignment.

(b) A timely supplemental motion for a new trial counts on the theory of newly discovered evidence. The second assignment of error is predicated of the overruling of such supplemental motion, the facts in judgment appearing in due course.

I. *Of assignment a.*

There is no complaint made of the *form* in which the question of future medical services is put to the jury. The complaint is narrowed to the contention there was no evidence on which to predicate such recovery and that is the sole issue. Attend to that. The medical testimony indicates the broken leg "seems to be fairly well." When the fracture was reduced at the outset the bones did not knit blandly.

Measure of
Damages:
Future
Medical
Attention.

It seems the bones had been crushed somewhat and this crushing made the fracture a "comminuted" one. It seems both bones of the leg were broken, hence the fracture was a "compound" one. It seems that some of the flesh and ligaments got between the parts of this fracture. This fact was not discovered at the start and caused suppuration and failure to knit, thus giving rise to a "complicated" fracture.

Subsequently a serious operation was performed in the hospital and the bones wired together. It was several months healing. There is still pain in the wounded limb, and tenderness in the parts. The injury was of a sort that permanently shortened, and gave a limp to, the leg, and up to the time of trial (over a year) had prevented plaintiff's employment as a common laborer. Being without education, that was his only vocation.

There does not seem to have been any operation for the hernia. The doctors prescribed lying in a favorable position and rest. By such means the hernia was reduced, but the medical testimony agrees with common observation that the trouble is likely to recur. Plaintiff's doctor in testifying, asked for an opinion whether he would have trouble in the future from this rupture, replied: "He may have at any time." Another place the record shows these questions to the physician and his answers: "What about this rupture, will that continue in your opinion? A. I think it will. That is, I think if he strains himself it is likely to come out again. . . . Q. Does that rupture interfere with his lifting in any way in your opinion? A. Well, I think it would."

Under the medical testimony nothing short of an operation will put the dislocated testicle in the place nature designed for it; but there is no testimony tending to show that an operation is either necessary or advisable to protect or restore the integrity of its normal function or that its present condition is dangerous

to health, inconvenient or makes or tends to make it *functus officio*.

In this condition of the record we rule as follows on the first assignment:

(1) The testimony leaves the question of the reasonable probability or necessity of medical services to replace the dislocated testicle a matter of merest conjecture. There is nothing to show it would be safe or better to replace it by surgical means, hence that part of the instruction on the measure of damages, allowing a recovery for future medical attention could not well stand on this part of the record.

In leaving this branch of the case we by no means rule that plaintiff is not entitled to recover substantial damages for the pain and suffering incident to the forceful dislocation of the part. It is ingeniously argued by appellant's learned counsel that the accident did not (and could not) cause the dislocation. They rest the argument on the fact that the doctors testified they never read of or saw an incident of the kind. That the size of the usual canal, protected, as it is, by muscular rings, excludes the idea that the testicle could be driven by force from nature's sack up and into the abdomen along this canal; but this testimony was merely advisory. We stress the fact there was testimony of lay witnesses, unimpeached save from these theories of the testifying doctors, that before the accident this man was normal in this particular and abnormal ever after. The testimony of the mother negatived the medical theory advanced, to-wit, that the progress of the testicle down had merely been arrested in the foetal stage (a common phenomenon) and that it never had been in place. That it is now dislocated and is in the region of the hernia is shown by both the lay and the medical testimony. Now, it is trite doctrine that the credit due the testimony of lay witnesses directed to establishing facts as against the advisory theorizing of the expert witnesses, is always for the

jury, not the court; for to all such expert speculative theorizing the suggestion of the Melancholy Dane applies: "There are more things in heaven and earth, Horatio, than are dreamt of in your philosophy." If some witnesses say "it couldn't" and some say "it did," what then? Does such divergence make an insoluble problem in jurisprudence—put the matter in the air, in suspension like Mahomet's coffin? Not at all. The common sense of the jury settles it.

(2) But when we come to the reasonable necessity for medical assistance in the future arising from the hernia and the leg we are of opinion there was substantial testimony upon which the challenged clause of the instruction on the measure of damages can rest. True, a doctor (long in prior attendance) had not attended this plaintiff for some time before the trial, but we cannot say as a matter of law that a leg so seriously injured as to incapacitate a man from common labor for a year and which is still painful and tender will not require medical attention and medicines in the future. To the contrary it would look entirely reasonable and probable, judging from the tendency of the proof, that such would be the case. The same, only to a greater extent, may be said of the hernia. When some of the abdominal walls are ruptured and the intestines have once protruded, as the uncontradicted evidence showed in this case, it is common knowledge that the trouble will with reasonable certainty recur from lifting or the vicissitudes of ordinary labor. The medical testimony runs on all-fours with that idea. We know and the jury knew medical attention in the future would be reasonably certain to guard the situation, or to reduce the recurring hernia or prevent strangulation. To the common sense then of the jury, guided by their conscience, their everyday experience, their sound judgment, their oaths, must be left the question; for there is no line of testimony by which the fact may be established to an absolute certainty.

Sang v. St. Louis.

To leave it to the jury is the best the law can do, for no case calls for better testimony than the case admits of. [Sotebier v. Transit Co., 203 Mo. 702; Mabrey v. Road Co., 92 Mo. App. 1. c. 603; Feen v. L. I. R. R. Co., 116 N. Y. 1. c. 382.] The rule is that adequate compensation may be recovered in a single action for all the natural consequences of a negligent act. That principle controls here. Future expenses from physicians rest upon the same grounds as the probable loss of future earnings. [Turner v. Boston & Me. R. R. Co., 158 Mass. 1. c. 267.]

Moreover, if, in the state of the proof, defendant desired to limit the recovery for future medical services to a nominal amount, it should have tested out its right to do so by asking an instruction to that effect. [King v. St. Louis, 250 Mo. 1. c. 514; State ex rel. United Rys. Co. v. Reynolds, 257 Mo. 19.]

(3) But if we were to allow appellant's contention out and out, to-wit, that the instruction was too broad in the particular in hand, we would still not reverse the judgment, because: Here is a case where the uncontradicted proof showed liability for past medical and surgical attention resulting from the injuries in the rise of \$400. The same character of proof showed that the plaintiff, as a result of his injuries, had been out of employment for over a year and that his earning capacity was \$15 per week. That would make his past loss in earnings from his labor over \$720, or a total on those two items of \$1120. Deducting that from his verdict of \$4000, we have left a bit the rise of \$2800 for future loss of earnings, for a permanent injury, a shortened and limping leg, pain and suffering from a compound fracture with subsequent complications, a hernia and a testicle dislocated by force. In the face of such facts showing a modest recovery for serious injuries, undisputed, it would be trifling with justice to suppose that the jury allowed anything of substance on the issue of future medical services; for the ver-

dict is all absorbed by referring it to damages plainly suffered and about which there can be no speculation. In that view of it we say that the error complained of, if error at all, becomes self-evidently harmless and, hence, nonreversible.

II. *Of assignment b.*

Recurring to the record, a summary sufficient to an understanding of the question whether there was error in overruling the supplemental motion for a new trial, follows: The accident happened on October 3, 1910. Suit was brought March 17, 1911. The answer was filed April 5, 1911. The trial was begun October 16, 1911. When court arose, the testimony not being all in, the trial was laid over until the next day, the 17th. At the close of that day for like reason it was laid over until the 18th, when it was completed and a verdict had. By its answer defendant interposed contributory negligence as a defense—contributory negligence with a specification, “to-wit, that plaintiff did not exercise due care in watching the direction in which he was driving.” There was a showing by the city in support of the supplemental motion to the effect that it was unaware of the accident and had no notice until suit was brought, i. e., for the rise of five months. But there was a satisfactory countershowing to the effect that the city had immediate notice. Plaintiff and a witness driving with him testified to the effect there was a lamp post at the *locus in quo*, but that the lamp was not going. It seems to be conceded that at the time of the accident (6:30 p. m.) city lamps were due to be lighted. As we read it, the light at this point was of gasoline. After plaintiff was injured he worked his way to this lamp post and held himself up by it—his horse having broken from control and passed on a ways. While in this fix, a man and his wife drove up in a buggy and, ascertaining the trouble, the man took

plaintiff and drove him to his home. This man's name was Graffeman, but plaintiff did not know his name then or afterwards. It is not clear on what theory plaintiff needed the testimony of this witness, as there was plenty without it, and it does not appear that he took any steps to ascertain the name or to summon the man or his wife. Nor did he conceal information. The fact that plaintiff was taken home in the buggy of some person, coming on the scene after the accident, was known to the city long before the trial. It seems some attempt was made by the city to find out the name, and plaintiff, being inquired of, frankly stated he did not know it. Neither at that time, nor afterwards when his deposition was taken by the city, was plaintiff asked whether he knew any person who did know the name. At the first day of, and early in the trial plaintiff was on the stand in his own behalf as the first witness, and the following record was made on his cross-examination:

“Q. When you got out of the street you say you went over to this lamp post on the northeast corner? A. I hopped over, yes. Q. And then how did you get home? A. There was a man and lady come along in a horse and buggy. Q. Who were they? A. I do not know their names, and they took me on home in the horse and buggy and went and got the nearest doctor in the neighborhood. Q. You say you don't know who they were? A. No, I was there about twenty minutes before they came along. Q. Did you ask who they were? A. No, I did not; but the party that works in the brewery knows their names. Q. You never have seen them? A. I have seen them, yes. Q. When did you first see them? A. The night this happened. Q. I mean after? A. No, I ain't seen them after that. Q. You don't know where they live or anything about them? A. No, I couldn't say where they live. Q. Who is the person at the brewery that knows them?

A. Fred Brandt. Q. How do you spell that name? A. I don't know. Q. Brandt? A. Brandt. Q. What does he do at the brewery? A. He is in the office, clerk there; as far as I see, he is writing."

Reference having been made in the foregoing testimony to a "brewery," it will do to say that the city knew all along that plaintiff was a driver for the Union Brewery Company of St. Louis. His petition so states and the fact stands conceded. It seems the Fred Brandt mentioned was working for the same brewery at the time of the trial and had been for a long time in some minor official capacity. It seems also he was easily accessible by telephone or messenger and that he actually knew the name and the place of residence of the Graffeman who carried plaintiff home, and of his wife. This Graffeman was a member of a well-known family, easily accessible, but, I believe, had no telephone. It is conceded by the city that after the foregoing testimony over twenty-four hours went by, it is contended by respondent that over forty hours went by, before this Graffeman was located. No inquiry was started on the first day as we read the record, nor on the second day of the trial, and then nothing but the telephone was used. No subpoena was issued. No attempt was made to have any officer, charged with the duty of locating witnesses or summoning them, attend to that duty, but the trial flowed on unruffled to the end. Presently after an adverse verdict and judgment, the witness Graffeman and his wife were located and an affidavit was procured from each in substance to the effect that the street light in question was going when they came upon the scene. The city had contented itself with submitting the case on the question of light or no light on mere negative testimony that no complaint had been made of the absence of a light at the time and place. On such record, the trial judge was of opinion that due diligence was not shown and we are of the same opinion. If it be conceded to the

city that the testimony was material on its issue of contributory negligence, as tending to show that the driver of a beer wagon drove into an open hole within the radius of the light of a street lamp, yet when it allowed the trial to progress for a day or two to its consummation, warned of the existence of the witnesses and armed with the information that the names of the witnesses were in the possession of Brandt, it seems clear that due diligence was not used to obtain the testimony at the trial. As in the issue of negligence, so it is in diligence, to-wit, what is due diligence varies with the facts and circumstances of each case. Let it be assumed (which is an assumption of doubtful stability) that defendant was diligent in preliminary preparation, yet here there was an emergency sprung and sharp diligence was necessary after notice. Defendant after it had notice made no objection to going on with the trial, no objection to the submission to the jury, asked no recess or similar favor at the hands of the trial judge, but stood mute, folded its arms and suffered the issue to be determined adversely, content to take its chances with the testimony at hand. We overrule the assignment on the authority of *State v. Nickens*, 122 Mo. 607; *State v. McKenzie*, 177 Mo. l. c. 716; *Devoy v. Transit Co.*, 192 Mo. 197; and *Porter v. St. Joseph Stock Yards*, 213 Mo. 372.

The doctrine of this court is the Georgia doctrine (*vide* the *McKenzie* case, *supra*): "The party must show, first, that the evidence has come to his knowledge since the trial; second, that it was not owing to the want of due diligence that it did not come sooner; third, that it is so material that it would probably produce a different result if the new trial was granted; fourth, that it is not cumulative only; fifth, . . .; sixth, that the object of the testimony is not merely to impeach the character or credit of a witness." The rule thus laid down is stringent, but useful and ought

not to be relaxed. Measured by that rule, appellant has no foot to stand upon in its second assignment of error.

Moreover, even if the testimony of these two witnesses had been given at the trial, yet it is not at all clear the result would not have been precisely the same. With a street and a hole in the street flooded with water, how would the glimmer of a street lamp give plaintiff notice of the depth of the hole so that his driving in it would have made him guilty of contributory negligence as a matter of law? Or how would it have persuaded a jury that he was guilty as a matter of fact?

Entitled to one fair trial, the city, we think, got it. Let the judgment be affirmed. All concur; *Bond, J.*, in result.

ETHEL THOMPSON v. WABASH RAILROAD
COMPANY, Appellant.

Division One, December 2, 1914.

1. **INTERSTATE COMMERCE: Empty Cars.** The hauling by an interstate railroad of a train of empty freight cars from a point in one State to a point in another State, is interstate commerce. The fact that the cars are empty does not make the shipment any the less interstate than it would be were they loaded either with articles of commerce or passengers.
2. ———: ———: **Proper Plaintiff: Widow of Killed Foreman:** Under U. S. Employers' Liability Act. The right of a widow of a fireman for a train of empty cars being hauled by an interstate railroad from a point in one State to a point in another State, to recover for his negligent death, caused by a collision of his train with another, is dependent on the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act. Where said act is invoked and the shipment and road are interstate, the plaintiff's right to recover is regulated thereby, and not by the State Damage Act (Sec. 5425, R. S. 1909).

Appeal from Randolph Circuit Court.—*Hon. A. H. Waller*, Judge.

REVERSED AND REMANDED (*with directions*).

J. L. Minnis and Robertson & Robertson for appellant.

(1) The petition does not state a cause of action and the court erred in overruling defendant's objection to the introduction of any evidence thereunder. The petition disclosed that defendant was engaged in interstate commerce and decedent employed in such commerce, therefore the only cause of action that could have arisen was by virtue of the Federal Employers Liability Act and there could be no action maintained under Sec. 5425, R. S. 1909. *Railroad v. Vreeland*, 227 U. S. 66; *Second Employers Liability Cases*, 223 U. S. 54; *Railroad v. Alabama*, 128 U. S. 99; *Railroad v. Hefley*, 158 U. S. 104; *Henderson v. New York*, 92 U. S. 271; *Gaslight Co. v. Light Co.*, 115 U. S. 661; *Morgan's Co. v. Board of Health*, 118 U. S. 464; *State v. Railroad*, 238 Mo. 21; *Railroad v. Birch*, 224 U. S. 547; *State v. Railroad*, 212 Mo. 658; *Rich v. Railroad*, 166 Mo. App. 389; *Thornton on Federal Employers' Liability and Safety Appliance Acts* (2 Ed.), sec. 160, see also Appendix "A" to "H," pp. 397 et seq.; *McCulloch v. Maryland*, 4 Wheat. 415; *Adams Express Co. v. Croninger*, 33 U. S. Sup. Ct. Rep. 148; *Railroad v. Ellis*, 153 S. W. 701; *Railroad v. Lester*, 149 S. W. 841. (2) The court erred in refusing to instruct a verdict for defendant at the close of the evidence for the plaintiff and at the close of all the evidence. Because the evidence showed defendant was engaged in interstate commerce and decedent was employed in such commerce at the time of his death.

M. J. Lilly and Phillips & Phillips for respondent.

(1) The petition states a cause of action under Sec. 5425, R. S. 1909, and not under the Federal Em-

ployers' Liability Act as contended by appellant. It appears from the petition that plaintiff's husband while in the employ of the defendant came to his death by the negligence of co-employees, and that he died from an injury occasioned by the negligence of certain servants of defendant whilst running, conducting and managing a locomotive and train of cars, which would bring plaintiff within the provisions of section 5425; but it does not appear that either deceased or his co-employees, by whose negligence he was killed, were engaged in interstate commerce at the time, which would be necessary in order to create a liability against defendant under the Federal Employers' Liability Act. The petition contains an allegation to the effect that the train, on which deceased was serving as a locomotive fireman at the time of the collision which resulted in his death, was being operated from Moulton, Iowa, to Moberly, Missouri, but there is no allegation that it was laden with goods, wares or merchandise or that it was carrying passengers, being transported from one State to the other, and the evidence shows that the train was composed entirely of empty cars. A train composed of empty cars destined from a point in one State to a point in another State to procure a load is not engaged in interstate commerce. *Railroad v. Virginia*, 93 Va. 749; 7 Cyc. 417; 34 L. R. A. 105. Commerce among the several States includes the transportation of passengers and property from one State to another. *Smith v. Turner*, 7 How. (U. S.) 401; *Addyston Pipe Co. v. U. S.*, 175 U. S. 241; *Ferry Co. v. Pennsylvania*, 114 U. S. 203; *In re Grand Jury* (U. S.), 62 Fed. 828. The facts of this case differentiate it from the case of *Rich v. Railroad*, 166 Mo. App. 379, to which appellant refers as a case in point, and what is said there has no application here. The rule announced in *Rich v. Railroad*, *supra*, is "a car laden with goods and being moved from a point in one state to a point in another is impressed with the character

of interstate traffic which will follow and attend the shipment until the transit ceases." With the rule thus announced respondent finds no fault; but in the case at bar where the cars composing the train were empty it has no application. In this case nothing was being transported—no passengers, no property; only that which might be made an instrument of commerce—a train of empty cars, was being moved. (2) The case was properly submitted to the jury by appropriate instructions which correctly declared the law as applied to the facts of the case developed by the testimony. The evidence established a cause of action in favor of plaintiff and against defendant under Sec. 5425, R. S. 1909, and does not show that her husband for whose death damages are asked was engaged in interstate commerce at the time of the injury resulting in his death.

WOODSON, P. J.—The plaintiff instituted this suit in the circuit court of Randolph county, against the defendant, to recover \$10,000 damages, claimed to have been sustained by her by reason of the alleged negligence of the defendant in killing her husband, R. W. Thompson, a railroad fireman, while in the employ of the company. The suit was brought under section 5425, Revised Statutes 1909.

A trial was had in the circuit court which resulted in a judgment in favor of the plaintiff for the sum of \$10,000. In due time and in proper form the defendant appealed the cause to this court. The petition was in conventional form and properly stated a case under said section of the statute.

Prior to answering, and in proper time and due form, the defendant filed a petition and bond for a removal of the cause to the circuit court of the United States, for the Northern Division of the Eastern District of Missouri.

The petition set out that the action arose under the act of Congress approved April 22, 1908, entitled, "An

Act relating to the liability of common carriers by railroad to their employees in certain cases;" that it appeared from plaintiff's petition that the defendant was engaged in, and decedent was employed in, interstate commerce at the time of his death (stating the averments of plaintiff's petition); that the question in the suit was whether plaintiff was entitled to recover under the act of Congress approved April 22, 1908, and that the suit involved a controversy with respect to the true meaning and intent of the act of Congress and its operation and effect upon the alleged facts of plaintiff's petition. This petition was overruled and exceptions were duly saved.

Defendant's amended answer, filed March 14, 1911, upon which it went to trial, was a general denial; also it set out that defendant was engaged in commerce between the States and that decedent at the time of his death was employed in such commerce; that plaintiff was not the administratrix or personal representative of decedent and the action was not brought by her in such capacity, as provided by the act of Congress of April 22, 1908, and the plaintiff was not entitled to maintain the action as the widow of decedent. Further that the State circuit court had no jurisdiction, but that the jurisdiction was in the United States circuit court.

The answer then alleged that the collision was the result of decedent's own negligence and further as the result of his own negligence directly contributing with others with whom he was engaged in operating the train.

The answer also set up the unconstitutionality of the act of Congress approved April 5, 1910, conferring jurisdiction on State courts, as in conflict with section 1 of article 3 of the Constitution of the United States and certain amendments thereto, as well as certain provisions of the Constitution of the State of Missouri.

The reply was a general denial.

Thompson v. Railroad.

At the beginning of the trial the defendant objected to the introduction of any evidence under the petition for the reason that it did not state facts sufficient to constitute a cause of action against the defendant; that the plaintiff could not maintain the action because it arose under the "Federal Railroad Employers' Liability Act of April 22, 1908;" and that the court had no jurisdiction of the cause.

This objection was overruled and exceptions were duly saved.

The facts are few and not disputed; and are substantially as stated by counsel for respondent:

Respondent's husband, R. W. Thompson, while in the employ of appellant as a locomotive fireman on an extra freight train, was killed in a collision between said freight train and one of defendant's passenger trains, on defendant's line of railroad, at a point about one and one-half miles south of Glenwood, Missouri, on the 28th day of August, 1909. Within six months thereafter, plaintiff, the widow of deceased, brought this action against defendant to recover damages for the death of her said husband, under the provisions of section 5425, Revised Statutes 1909, it being claimed by plaintiff that her husband came to his death by reason of the negligence of certain of his co-employees, namely, the engineer and conductor in charge of said freight train, in operating same in so negligent a manner as to cause it to run into and against and to collide with said passenger train.

The defendant was operating a railroad for the transportation of freight and passengers from Moberly, in the State of Missouri, to Moulton and other points in the State of Iowa.

The extra freight train on which plaintiff's said husband was serving as fireman was in charge of Finis McLeen as engineer and Warren Cundiff as conductor. There were also a head and rear brakeman on the train. It left Moulton, Iowa, for Moberly, Missouri, about

8:45 the morning of the collision and made but one stop thereafter prior to the collision; that stop being made at Glenwood Junction, a station about one mile north of Glenwood, Missouri. It left Glenwood Junction at 9:30 and passed through Glenwood without a stop. The collision occurred at 9:39. The passenger train with which the extra freight collided, ran daily, except Sunday, between Moberly and points in Iowa, and was run on schedule time and had superior rights to all extras. It was due at Glenwood at 9:43, and at Glenwood Junction at 9:45. The passenger train was being run by a time-card and the freight train by order. The order under which the engineer and conductor were operating the freight train was to this effect: Extra 259 will run extra Moulton to Moberly. No. 2, engine 327, will wait at east yards Moulton until 10 a. m. for 2nd 95, engine 261. 2nd 95, engine 261, will wait at Glenwood Junction until 9:30 a. m. and at Coatesville until 9:40 a. m. for extra, engine 259. The stop made by the freight train at Glenwood Junction was for the purpose of letting 2nd 95 by. The extra freight train was composed of engine, tender and empty cars.

The collision occurred on the point of a sharp curve, and at that place the passenger train with which the freight collided could not have been seen from the cab of the freight engine a greater distance away than one hundred yards. The passenger train was discovered by the engineer of the freight train as soon as it could have been discovered. It was then within ten car-lengths of the freight train. The two trains came together in what is known as a "head-on" collision.

The engineer of the extra freight train accounts for the collision by the fact that both he and the conductor, who had charge of the train, overlooked the day of the week; that is to say, mistook Saturday for Sunday. The engineer received a go-ahead signal from the brakeman and conductor at Glenwood Junc-

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tion, he whistled for the station at Glenwood and again received a go-ahead signal, and, using the engineer's language, "got the board at the station," or in other words, the arm of the order board at Glenwood was down, giving the engineer the right to go ahead.

The deceased fireman, R. W. Thompson, at the time of his death had been in the employ of the defendant as a locomotive fireman six or seven months, the greater part of which time he served as an extra fireman, and as such his duties took him all over the Western Division of the Wabash Railroad which has a mileage of about nine hundred and fifty miles. The last two or three months prior to his death he served as fireman with Engineer McLean on trains 67 and 68, which were regular trains between Moberly and Moulton. The trains on which he served met the passenger train with which extra 259 collided many times in the course of that two or three months' employment, but not always nor even usually at any one station. In fact, as disclosed by the record of trains on which Fireman Thompson served in the course of the last two or three months of his employment, he had met the passenger train in question at practically every station on the Wabash Railroad between Moberly and Moulton.

On the day of the fatal collision, Engineer McLean and Conductor Cundiff had control and were in charge of the extra freight. The duty of Fireman Thompson was to keep steam on the engine and to watch for signals and to aid in the safety of the train to the extent of his ability.

Thompson remained upon the engine at his post of duty and did not protest to the engineer when the freight train was being run on the time of the passenger train, as shown by the time-card. The engineer testified that while going through Coatesville, which is north of Glenwood Junction, he stated to the fireman and head brakeman that it was Sunday and that if he

could get out of Glenwood Junction at 9:30, he would try to go to Moberly ahead of No. 2 which was the passenger train following. The engineer says that neither the fireman nor head brakeman made any reply to this statement. The head brakeman testified that the engineer turned to him and the fireman and asked if it was Sunday, and that he, the head brakeman, turned to him and said this isn't Sunday, and that the fireman said no.

At that time the freight train was going through Coatesville, had not reached Glenwood Junction and was not running on the time of the passenger train. The principal duty of the fireman was to keep fire in the firebox and to keep up steam. This required him to be down in the deck of the engine shoveling coal a great part of the time. When the freight train pulled out of Glenwood Junction, its last stop before the collision, it was only 9:30 and the next station was Glenwood about one mile away. At that time the passenger train lacked sixteen minutes of being due at Glenwood. Not until Glenwood was passed did the freight train begin to run on the time of the passenger train. The collision occurred about a mile and a half out of Glenwood. Not more than two or three minutes, at the outside, elapsed after the freight train crossed the danger line at Glenwood. For only two or three minutes at the most could Fireman Thompson have known that the freight train was running on the time of the passenger train, and he had only two or three minutes for protest even if he had realized and known the whole situation as it then existed.

Some of the facts will be made clear by setting out a few extracts from defendant's evidence.

The Engineer McLean testified:

That it was the duty of the fireman to keep up steam, watch for signals, to aid in the safety of the train to the extent of his ability, and whenever he discovered anything wrong he should tell it. That the

fireman was under the instructions of the engineer, but had nothing to do with managing the engine. That the brakemen were under the control and supervision of the conductor. Witness and fireman got an order that morning to run extra 259 from Moulton, Iowa, to Moberly. Thompson read the order. He was a man of good intelligence and a good fireman. The order meant that extra 259 was to keep out of the way of regular trains. No. 51 was controlled by a regular time-table. This time-table was identified by the witness as Time-Table No. 10. Witness kept one of those time-tables over his seat box in the engine cab where he could look at it. Witness was well acquainted with the running time of No. 51, learning it from the time-card. That morning he looked at the time-card at Moulton and saw the time of No. 51 at Glenwood. That morning when witness left Moulton he had it in his head it was Sunday. Coming through Coatesville he told the fireman Thompson, the decedent, and the head brakeman it was Sunday and that they would try to get out of Glenwood Junction at 9:30. Neither the decedent nor the head brakeman replied. Witness announced it was Sunday and he was going on. Neither decedent nor head brakeman told the witness it was not Sunday. His train lay at Glenwood Junction eight minutes to let 2nd 95 by. No. 2 was following witness's train, forty-five minutes late. Witness received orders that 2nd No. 95, a freight, would wait until 9:30 at Glenwood for Extra 259 to pass. Witness was trying to beat No. 2 to Moberly. No. 2 was a superior passenger train. Passing Glenwood station, witness saw people on the platform of the station, indicating they were there to take a train. The decedent could see these people plainer than witness. No. 2 was not due regularly in Glenwood until 10:12 and that day was forty-five minutes late. Witness passed through Glenwood thirteen minutes before No. 51 was due and forty minutes ahead of the regular time of No. 2, and one hour

and twenty-eight minutes ahead of No. 2's time that day.

It was the duty of the fireman to look out for the safety of the train. Thompson had been making this run for three months and meeting No. 51. Extra 259 consisted of ten cars, going from Moulton, in the State of Iowa, to Moberly, Missouri. No. 51 was a passenger train with three cars and running from Moberly, Missouri, to Ottumwa, Iowa.

Firemen get their time-cards as engineers; get them at the round houses by asking for them. Witness identified book of rules of defendant, marked Exhibit 2.

There was other evidence corroborative of that of the engineer.

I. There are but two legal propositions of importance presented by this appeal, viz.:

First: Was the deceased, R. W. Thompson, at the time he met his death, engaged in interstate commerce? and, second: Was he at that time guilty of such contributory negligence that directly contributed to his injury?

Before the plaintiff can recover both of these questions must be answered in the negative, while the affirmance of either would lead to a reversal of the judgment and a denial of her right to a recovery in this particular case.

For convenience we will answer these questions in the order in which they are stated.

Attending the first: It is practically conceded, or rather the evidence for both parties shows, that the Wabash Railroad Company was duly organized and incorporated under the laws of the State of —, and was engaged in the business of transporting both freight and passengers over its road, one branch of which leads from Moberly, Missouri, to Moulton, and other points in the State of Iowa, by means of locom-

tive engines and cars managed by crews composed of engineers, firemen, conductors, brakemen, porters, etc.

The deceased, the late husband of the plaintiff, had been engaged as a fireman on one of the company's engines hauling freight in cars, between said points over said road, for some six or seven months. Counsel for each party concede that this general work in which the deceased was engaged was interstate commerce, but counsel for the plaintiff insist that at the particular time at which the deceased met his death, he was not so engaged, for the reason assigned, that the train of cars which the engine in which he was firing was drawing, were empty cars, containing neither freight nor passengers, and therefore he was not engaged in interstate commerce. In other words, it is insisted that interstate commerce consists of carrying or transporting either freight or passengers or both, from one State to another by various instrumentalities, and that since this particular train was carrying neither, it could not be logically contended that he was engaged in interstate commerce.

In support of this general contention we are cited by counsel for appellant to the following cases: Passenger Cases, 7 How. (U. S.) l. c. 401; Addyston Pipe & Steel Co. v. United States, 175 U. S. l. c. 241; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. l. c. 203; In re Charge to Grand Jury (U. S.), 62 Fed. 828, l. c. 831.

And in support of the particular question in hand, we are by counsel for respondent cited to the case of Norfolk Ry. Co. v. Commonwealth of Virginia, 93 Va. 749. That case clearly supports the contention of counsel. In that case the Supreme Court of Virginia held that a train consisting of empty freight cars, which had been used exclusively to transport coal from one State to another and which was intended to be so used again, was not, while being returned from one point in that State to another State, engaged in the transpor-

tation of articles of interstate commerce, although *en route* to the coal fields outside of that State.

While that is a highly respectable court, yet we, under the more recent ruling of the Supreme Court of the United States, the final arbiter in all such cases, are unable to lend our concurrence to the view of the law as there announced.

In construing the act of Congress mentioned, the Supreme Court of the United States, in the case of Michigan Central Railroad Company v. Vreeland et al., 227 U. S. 1. c. 66, said:

“We may not piece out this Act of Congress by resorting to the local statute of the State of procedure or that of the injury. The act is one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the States.

“Prior to this act Congress had not deemed it expedient to legislate upon the subject, though its power was ample.

“ ‘The subject,’ as observed by this court in *Mondou v. Railroad*, 223 U. S. 1, 54, ‘is one which falls within the police power of the state in the absence of legislation by Congress.’ [*N. C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96, 99.] By this act Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the States. Thus, in *Gulf C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 104, it was said in reference to State legislation touching freight rates upon interstate freight which conflicted with the legislation of Congress upon the same subject, that:

“Generally it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the nation. “No urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.” [Henderson v. Mayor of New York, 92 U. S. 259, 271.] “Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.” [New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 661.] “While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail.” [Morgan’s S. S. Co. v. Louisiana Board of Health, 118 U. S. 455, 464.]’

“It therefore follows that in respect of State legislation prescribing the liability of such carriers for injuries to their employees while engaged in interstate commerce, this act is paramount and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the states.” In the Second Employers’ Liability Cases, 223 U. S. 1, the court said, l. c. 46:

“The principal questions in these cases as discussed at the bar and in the briefs, are: 1. May Con-

gress, in the exertion of its power over interstate commerce, regulate the relations of common carriers by railroad and their employees, while both are engaged in such commerce? 2. Has Congress exceeded its power in that regard by prescribing the regulations which are embodied in the act in question? 3. Do these regulations supersede the laws of the States in so far as the latter cover the same field? 4. May rights arising under those regulations be enforced, as of right, in the courts of the States, when their jurisdiction, as fixed by local laws, is adequate to the occasion?"

Continuing on page 53 the court said regarding the question there:

"The third question, whether those regulations supersede the laws of the States in so far as the latter cover the same field, finds its answer in the following extracts from the opinion of Chief Justice MARSHALL in *McCulloch v. Maryland*, 4 Wheat. 316."

And on pages 54 and 55, the court said:

"True, prior to the present act the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the States in the absence of action by Congress. . . . The inaction of Congress, however, in nowise affected its power over the subject. . . . And now that Congress has acted, the laws of the States in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is."

In the opinion in *McCulloch v. Maryland*, referred to, 4 Wheat. 406, Mr. Justice MARSHALL said:

"The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the

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supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding.' "

Also in the case of *Gulf Ry. Co. v. Hefley*, 158 U. S. 98, the question being whether a statute of the State of Texas which was in conflict with the Interstate Commerce Act, had any force, the court said, l. c. 103:

"The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes operating upon the same subject-matter prescribe different rules. In such case one must yield, and that one is the State law."

Continuing on page 104, the court further said:

"Generally it may be said in respect to laws of this character, that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the State, is subordinate to those in terms conferred by the Constitution upon the nation."

In the case of *Adams Express Company v. Croninger*, 226 U. S. 491, the question was whether or not a contract between plaintiff in error and defendant in error, the plaintiff below, limiting the shipper's recovery to an agreed value, was invalid. The local law of the State was that such contract was invalid, and the shipper was entitled to recover the actual value. The shipment was an interstate shipment. The court held that the Act of Congress of June 29, 1906, controlled, saying, page 500:

"But it is equally well settled that until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular State, although engaged in the business of interstate commerce, for loss or damage to such property, may be

regulated by the law of the State. Such regulations would fall within that large class of regulations which it is competent for a State to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the State over such carriers and its duty and power to safeguard the general public against acts of misfeasance and non-feasance committed within its limits, although interstate commerce may be indirectly affected."

Mr. Justice LURTON, quoting, on page 505, said:

"The Congressional action has made an end to this diversity, for the national law is paramount and supersedes all State laws as to the rights and liability and exemptions created by such transactions. This was doubtless the purpose of the law; and this purpose will be effectuated, and not impaired or destroyed by the State court's obeying and enforcing the provisions of the Federal statute where applicable to the fact in such cases as shall come before them."

On the same page he further said:

"Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject and supersede all State regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist."

In the case of the State of Missouri v. Wabash Railroad Co., 238 Mo. 21, the defendant was proceeded against for a violation of sections 7818 and 7819, Revised Statutes 1909, regarding the hours of labor of railroad trainmen. The violation occurred in February, 1907. The evidence showed that the conductor who violated the statute was engaged in interstate commerce. There this court held that the same subjects

were covered by the Act of Congress of March 4, 1907, regarding the hours of labor, and therefore our statutes on the same subject were abrogated. The language of this court was as follows:

"Consequently, in the case at bar, we are compelled to hold that, since the Act of Congress before mentioned covers the same subjects or classes of legislation that are covered by the Act of the Legislature of 1905, the former nullifies the latter as completely as if it had never been enacted."

And in *Rich v. St. L. & S. F. R. R. Co.*, 166 Mo. App. 379, is a case exactly in point. There the widow of decedent sued under the State law. Defendant set up in its answer that the plaintiff could not maintain the suit because it arose under the Federal Employers' Liability Act, alleging the facts. On motion, the court struck out these allegations of the answer. The court speaking through NORTON, J., said, l. c. 389:

" 'And now that Congress has acted, the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is.' " This last quotation was from *Smith v. Alabama*, 124 U. S. 465.

On page 390 the court said:

"It is, therefore, obvious that, though plaintiff did not declare upon the Employers' Liability Act, she nevertheless may not maintain this suit under our statute, for the right of recovery is given by the authority of Congress to the personal representative of her husband for the benefit of herself and his children. The court erred in striking out the portion of the answer above mentioned and in denying defendant the right to show the facts therein set forth."

In the case of *Eastern Ry. Co. of New Mexico v. Ellis*, 153 S. W. 701, the plaintiff sued in her individual capacity as widow on behalf of the parents of decedent and as the next friend of the minor children. She sought to recover under the Federal Employers' Lia-

bility Act of 1908. Defendant set up that plaintiff could not maintain the action because under the Federal act the right of recovery was limited to the personal representative of decedent. Plaintiff also alleged in her petition that she was suing upon a Texas statute. The trial court held that the State statute was superseded by the Federal statute, and if plaintiff had any cause of action it was under the Federal statute. Upon appeal, appellant contended that that provision of the Federal act requiring that a suit should be brought by a personal representative is directory only and not mandatory. The Supreme Court held that the plaintiff was not entitled to a recovery under the State statute.

There are many other cases both State and Federal, of like import. Those cited and reviewed, as well as others, in effect hold that a corporation engaged in such business is an instrumentality of interstate commerce, as well as its employees, and physical property, such as the road itself. That being true, I am unable to comprehend upon what ground it can be logically contended that a car, though empty, which is being hauled from one State to another in order to receive articles of interstate commerce, is not likewise an instrumentality of such commerce.

It is a well known fact that the freight and passenger traffic moves periodically, first in one direction, and then in the other. For instance, the great wheat and corn crops, as well as the cattle and hogs, of the West are, during the fall and winter months, shipped East. This requires many thousand of cars, far in excess of the number that is required, at that time, for the transportation of the manufactured articles and other commodities of the East destined for the West. The same is true of passengers. During the summer months and vacations of various kinds, great hordes of people go to the northern and western resorts, and even to the European, in order to escape the heat and

seek comfort, as well as to avail themselves of more congenial climes and view the lands and scenes of historical renown. This condition of things tests the capacity of common carriers one way, and compels them to haul the movable instrumentalities of transportations loaded one way and empty the other. In the very nature of the business, these empty cars must be returned, in order to carry the remaining freight and passengers not able or ready to go at an earlier date, and to accommodate the ordinary traffic in ordinary seasons.

We must presume that Congress was familiar with these natural conditions, or rather conditions created by natural causes, and had them in mind when the act of Congress under consideration was enacted.

Entertaining these views, I am satisfied that the Supreme Court of Virginia took too narrow a view of said act, and which, if adhered to, would greatly hamper and cripple interstate and foreign commerce, for the reason that there can be no intrastate or interstate commerce without the common carrier is authorized to return his or its empties, from the points of delivery of freight and passengers, to the intermediate and the other end of the road. They must have empty cars, boats and ships before they can be loaded with freight or passengers destined for interior or foreign points or ports.

If our foregoing observations are sound, then all agree, the court and counsel for both parties, that the plaintiff cannot maintain this suit under the Missouri statute, but must proceed, in order to recover, under the Act of Congress previously mentioned. That is for the reason, as briefly stated in the case of the State of Missouri v. Wabash Railroad Company, *supra*. As previously indicated, the plaintiff cannot recover in this case.

II. The conclusions reached in paragraph one of this opinion render it unnecessary to undertake to answer the second interrogatory propounded at the beginning of this opinion, for the reason that the conclusions so reached completely dispose of this case.

We are, therefore, of the opinion that the judgment should be reversed and the cause remanded to the circuit court with direction to dismiss plaintiff's petition.

It is so ordered. *Lamm, J.*, concurs in separate opinion; *Graves, J.*, concurs; *Bond, J.*, concurs in result.

LAMM, J. (concurring).—On this record, the most favorable view possible for respondent is that her husband was fireman on a locomotive drawing a train of *empty* freight cars from Moulton in Iowa to Moberly in Missouri, on the Wabash, an interstate railroad. These cars, the testimony shows, were mostly headed for St. Louis, Missouri, belonged to other roads, and were intended for distribution at St. Louis to the carriers owning them. On such a record, though doubting much at the hearing, I am constrained to concur in the opinion of our learned Presiding Judge, putting my concurrence on the ground that the final arbiter on the question has spoken.

In *North Carolina R. R. Co. v. Zachary*, Administrator of Burgess, 232 U. S. 248, where the precise point was in judgment, Mr. Justice PITNEY spoke for the whole court in holding, first, that the Federal Employers' Liability Act is *in pari materia* with the Federal Safety Appliance Act; and, second, that the hauling of *empty* cars from one State to another is interstate commerce within the meaning of said Employers' Liability Act.

An excerpt from that case, encompassing the sum of the matter, will not be amiss:

“There seems to be no clear evidence as to the contents of these cars, and it is argued that, in the absence of evidence, it is as reasonable to infer that they were empty as that they were loaded; and that it was incumbent upon defendant to show that they contained interstate freight. We hardly deem it so probable that empty freight cars would be hauled from the Virginia point to Spencer. But were it so, the hauling of empty cars from one State to another is, in our opinion, interstate commerce within the meaning of the act. Such is the view that has obtained with respect to empty cars in actions based upon the Safety Appliance Act of March 2, 1893 (27 Stat. 531, c. 196). [Johnson v. Southern Pacific Co., 196 U. S. 1, 21; Voelker v. Railway Co., 116 Fed. 867, 873.] And the like reason applies, as we think, to actions founded upon the Employers’ Liability Act, which, indeed, is *in pari materia* with the other.”

As appositely put by Hook, Circuit Judge, speaking for the Circuit Court of Appeals, in Chicago, M. & St. P. Ry. Co. v. United States, 165 Fed. 423, if these cars had been loaded on flat cars and were being transported in that fashion from Iowa to Missouri, there could be no shadow of question but that their carriage would be interstate commerce. Such being the case, what difference does it make in principle that they were being run on their own wheels and coupled by their own coupling to each other and to the engine? In other words, the traffic of interstate commerce “may as well consist of the property of carriers as the property of merchants.”

Learned counsel for appellant cite a line of cases under the Safety Appliance Act showing that under circumstances here the Safety Appliance Act would apply; hence if that act, as held by Mr. Justice PITNEY, *supra*, is *in pari materia* with the Federal Employers’

Liability Act and if the two are to be construed together, that line of cases is directly in point. It was on that theory such cases were used by Mr. Justice PRINCEY to support the judgment in *North Carolina Ry. Co. v. Zachary, Admr.*

That when the Congress of the United States, under its constitutional power of regulating interstate commerce, has occupied the field by its statute, the State damage act must give way, *pro tanto*, where the two overlap in remedy, is not to be questioned for a moment. However much the State bench and bar may revere the old landmarks of our statute on damages, they must be willing to see that statute yield when the paramount authority of the Federal Government once takes over any phase of the regulation of interstate commerce and the liability of carriers in that line of business, as it has done in this instance.

Wherefore, I vote to concur.

THE STATE ex rel. F. P. BLAIR, COLLECTOR OF
CARTERVILLE, Appellant, v. CENTER
CREEK MINING COMPANY.

Division One, December 2, 1914.

1. **FORMER ADJUDICATION:** Action by State for Taxes. The doctrines of *res judicata* and estoppel by judgment apply to actions by the State for the collection of taxes. And an adjudication is not only conclusive against the State as to the very taxes which were its subject, but its effect extends to those incidental questions actually and necessarily decided in reaching the judicial result.
2. ———: ———: **Matters Concluded.** Where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit between the same parties upon a different claim or demand, the inquiry must always be as to the point or question actually litigated and determined in the original action, not as to what might have been thus

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mitigated and determined. Only upon such matters is the judgment in the first action conclusive in the second.

3. **INCORPORATION OF TOWN BY COUNTY COURT: Judicial Act.** The incorporation of a town by the county court by authority of Laws 1871, p. 85, is a judicial act.
4. ———: ———: **Cannot Be Collaterally Attacked.** An order of the county court incorporating a town by authority of Laws 1871, p. 85, cannot be collaterally attacked, as, by way of defense to an action by the State for taxes.
5. ———: ———: **Matters in Attack to be Plead.** To assail an order of the county court incorporating a town or city, all essential infirmities and omissions therein must be alleged and proved with the same strictness that would be required in a bill in equity to amend a final judgment of a court of record for fraud or collusion.
6. **FORMER ADJUDICATION: Matters Concluded: Action By State for Taxes: Incorporation of Town.** Where certain city taxes assessed against defendant's property were held invalid on the theory that the ordinance of incorporation as a city of the fourth class was unreasonable in including such property, and the original order of incorporation as a town by the county court, which also included defendant's property, was not pleaded or in issue, the judgment is not conclusive, in a subsequent suit for other taxes, of the question whether defendant's property was rightly included in the city by the county court's order of incorporation.
7. **TAXATION: Board of Equalization: Certification of City Assessment: Yields to Land List.** While the certification of a city assessment by the county clerk, who is by statute secretary of the county board of equalization, is a sufficient authentication, yet the corrected land list of the county assessor is the original record of the equalized assessment, and the city assessment must yield to it.
8. ———: **City of Fourth Class: Assessment: Valuation Not to Exceed That For County Purposes.** Under Sec. 11, Art. 10, of the Constitution, declaring that the valuation of property for city taxes shall not exceed the valuation of the same property for State and county purposes, and under Sec. 9347, R. S. 1909, providing that the city and county assessors shall jointly assess the property in a city of the fourth class and after the assessment has been equalized by the county board of equalization the city assessor's books shall be corrected in accordance with the changes made by the board, a levy by a city of the fourth class based on an assessment made independently and at a valuation greatly in excess of that fixed for county purposes is invalid.

Appeal from Jasper Circuit Court.—*Hon. D. E. Blair*,
Judge.

REVERSED AND REMANDED.

Allen McReynolds for appellant.

(1) The court erred in admitting the land tax book of Jasper county for the years 1906 and 1907, which evidence shows a different valuation from that certified to by the clerk of the board of equalization on the city tax books. The city officers of Carterville had a right to rely upon the assessment appearing on the city tax book in making their levy. Sec. 5941, R. S. 1899; Sec. 9347, R. S. 1909. The presumption is that the assessing officer did his duty. *State ex rel. v. Burch*, 186 Mo. 205. The tax bill is *prima-facie* evidence that the amount of taxes is correct. *State ex rel. v. Hout*, 123 Mo. 355; *State ex rel. v. Bank*, 144 Mo. 381; *State ex rel. v. Bank*, 120 Mo. 161. (2) The court erred in admitting the files in the case of *State ex rel. Pease v. Center Creek Mining Company*, as the pleadings in that case indicated that the question in issue was the reasonableness of the extension of the limits of Carterville, and a judgment in that case could not be *res judicata* in the case at bar. See authorities under point 4. (3) The court erred in admitting the evidence of Spring for the reason that that evidence could not tend to establish the plea of *res judicata* as the defendant could not in this case make the defense of the reasonableness of the incorporation of this territory in the original town of Carterville. Our courts have declared unequivocally that the only way that this could be reached would be a *quo warranto*, for such a question goes to the very existence of the municipal corporation. Collateral attack of this character will not be tolerated. *Kayser v. Bremen*, 16 Mo. 88; *Fredericktown v. Fox*, 84 Mo. 65; *Flynn v. Neosho*, 114

Mo. 73; Kansas City v. Stegmiller, 151 Mo. 209; School District v. Hodgins, 180 Mo. 70; State ex rel. v. Burch, 186 Mo. 219; Stout v. Railroad, 146 Mo. App. 10; Salem ex rel. v. Young, 142 Mo. App. 160; Black v. Earl, 208 Mo. 281; State ex rel. v. Wilson, 216 Mo. 274. (4) The court erred in refusing to declare that the case of State ex rel. Pease v. Center Creek Mining Company was not *res judicata* in the case at bar. The doctrine of *res judicata* is not, as we understand it, especially complicated. In simple terms it means that the judgment in one case determines the question in controversy for all times between the same parties and the same issues. In the case at bar, so far as the parties are concerned, under the doctrine which controls in this State they were the same, but we undertake to say that as to the issues they were entirely different. It was entirely proper under the pleadings and the facts in evidence in the Pease case, to determine whether the extension of the limits as indicated was reasonable, and if the court concluded that the extension was unreasonable it was his duty to hold and find, as he did, for the defendant. In the case at bar the situation is entirely different. At the very threshold of the case—prima-facie showing of the taxes having been made—it is next developed that this land is a part of the original town of Carterville and was included in the order of the county court incorporating the community. This showing made, the status of the whole case changes. The extension of the limits and the inclusion of this territory within that original corporation was not subject to collateral attack in this tax suit. It was not possible in proceedings of this character to set up that the inclusion of this territory was unreasonable and improper. Such a plea would have constituted no answer under such circumstances. The sole and only remedy available to the Center Creek Mining Company or its predecessors owning this property was a *quo warranto* proceeding. See authorities

cited under point 3. The trial court, it seems to us, misconceived the doctrine and the place of the part that *res judicata* plays in this matter. State ex rel. v. Driving Park Co., 174 Mo. 425; New Orleans v. Bank, 167 U. S. 371; Turnverein v. Hagerman, 232 Mo. 693. The right to determine the Pease case could only rest upon the right to determine the reasonableness of the extension ordinance. The judge had no authority to inquire into the validity of the original incorporation nor the inclusion of territory within its boundaries. This issue was not even presented as a defense to this tax suit. The presumption of the law is that the court in determining the case had in view the decisions which controlled his actions and rendered a judgment which was in accordance with the decisions of the State and which he had authority to render. If that presumption be true, the trial court in the former case could have rendered judgment only on a matter of the reasonableness of the limits under consideration. A judgment directed at the validity of the original incorporation would have been void for want of jurisdiction.

L. E. Bates, Robert F. Stewart and R. M. Shepard for respondent.

(1) The court did not err in admitting the land tax books of Jasper county for the years 1906 and 1907, for the reason that the statutes provided that the assessment of the city property, as made by the city and county assessors, should conform to each other, and after such board of equalization has passed upon such assessments and equalized the same, the city assessor's books should be changed in red ink in accordance with the change made by the board of equalization; the books being introduced by the defendant to show that the assessed valuation as shown by the land

tax book was the correct one, and that the city tax list did not conform to it. R. S. 1899, sec. 5941, as amended by Laws 1901, p. 69; Center Bldg. Co. v. City, 108 Mo. 304. (2) The court did not err in admitting the files in the case of State ex rel. Pease v. Center Creek Mining Co., for the reason that the record in such case shows that the parties to that suit and the question involved in that suit, were identical with those in the case at bar; and hence the issues in the case at bar were made *res judicata* by the above named case. Choteau v. Gibson, 76 Mo. 46; Driving Park v. Kansas City, 174 Mo. 425; Turnverein v. Hagerman, 232 Mo. 704; Donnel v. Wright, 147 Mo. 647; Spratt v. Early, 199 Mo. 501. The court in the Pease case having jurisdiction over the parties and over the subject-matter, the judgment in that case could not be attacked collaterally. Leonard v. Sparks, 117 Mo. 103; State ex rel. v. Wear, 145 Mo. 162; Reed Bros. v. Nicholson, 158 Mo. 624; Donnel v. Wright, 147 Mo. 647; Spratt v. Early, 199 Mo. 501; Turnverein v. Hagerman, 232 Mo. 704; State ex rel. v. Wilson, 216 Mo. 274. (3) The court did not err in admitting the evidence of Spring, for the reason that the defendant in the case at bar was not making the defense of the reasonableness of the incorporation of this territory in the original town of Carterville, and hence not attacking such incorporation collaterally. The evidence of said witness Spring was introduced for the purpose of showing that the conditions of said land were the same then as when the Pease case was tried, which evidence was competent, material, and relevant. See cases cited under last head. (4) The court did not err in refusing plaintiff's declaration of law that the Pease case was *res judicata* as to this, for the reason that the ordinance of 1897, and not the original incorporation of the limits of the city of Carterville, was in effect during the years for which taxes were attempted to be collected both in the suit at bar and in the Pease case, and the limits of

Carterville as set out by the incorporation by the county court not being in force during the years for which taxes were sued for in the two suits, the limits so fixed had no bearing on the controversy either in the case at bar or in the Pease case. Authorities under points 2 and 3.

BROWN, C.—The plaintiff sues for taxes charged by the city of Carterville, in Jasper county, a city of the fourth class, on the northeast quarter of the southeast quarter of section 17 in township 28 of range 32 in said county, and alleged to be in said city, as shown by the following tabulated statement:

Years for which Taxes are due	Valua- tion	Gen'l Fund	Spe- cial	Sewer	Water Works	Total Taxes	Pn'y from Jan. 1st & Col's Fees	Total
1905	\$ 2000	\$10	\$ 5 00	.....	.....	\$ 15 00	\$ 8 55	\$ 23 55
1906	80000	400	200 00	.....	.....	600 00	270 00	870 00
1907	80000	400	.....	\$257	\$200	856	282 48	1138 48
1908	25000	125	62 50	80	.....	267 50	56 17	323 67
1909	22500	112	56 25	72	.....	239 75	27 58	267 33
								\$2623 03

The answer, after a general denial, pleaded facts relating to the situation and condition of the land tending to show that it ought not to be subjected to urban burdens, and stated "that the pretended ordinance purporting to extend the corporate limits of said city so as to include the defendant's land was and is unreasonable, unjust and oppressive, . . . and that

any and all acts whatever purporting or undertaking to include the said land within the corporate limits of said city of Carterville were and are unreasonable and void." It further pleaded that the same issue was adjudicated in a suit for taxes for previous years, in the Jasper County Circuit Court, wherein the State at the relation of one Al. Pease, collector of said city, was the plaintiff, and this defendant was the defendant, in which there was a judgment upon the same issue for the defendant.

The plaintiff introduced his tax bill, corresponding with the foregoing tabulated statement, and an entry from the records of the Jasper County Court, as of April 16, 1877, as follows:

"In the Matter of Incorporation of Carterville:

"Whereas, more than two-thirds of the inhabitants of the territory hereinafter named have petitioned the court setting forth the metes and bounds of their village and commons as follows:

"Beginning at the northeast corner of section No. seventeen (17), township twenty-eight (28), range thirty-two (32), running thence west three-fourths of one mile, thence south one mile, thence east three-fourths of one mile, thence one mile north to place of beginning. The platted town of Carterville being situated within the described bounds, and praying that the territory as above described may be incorporated under the name and style of the town of Carterville and a board of trustees appointed for the preservation and regulation of any commons appertaining to said town. And having asked that for the first trustees of said town that W. A. Daugherty, J. Alexander Wilson, A. N. Reynolds, J. O. Rose and Joseph W. Manlove be appointed.

"It appearing to the satisfaction of the court that the prayer of the petitioners is reasonable.

"It is ordered by the court that the territory above described be and the same is hereby incorporated under the name and style of the town of Carterville and W. A. Daugherty, J. Alexander Wilson, A. N. McReynolds, J. O. Rose, Joseph Manlove be and are hereby appointed trustees of said town."

The defendant introduced the "Land Tax Book" of the county for taxes of 1906 and 1907 and the "Land List" of the assessment for the same taxes. The valuation for each of those years as shown on these books is as follows:

The year 1906, total valuation by assessor \$2000; total valuation as adjusted by the board of equalization, \$6000. 1907, total valuation by assessor \$12,000; total valuation as adjusted by the board of equalization, \$15,000. The State and county taxes were charged on those valuations. The tax books of Carterville for the same years were in evidence, and showed a valuation upon this land for each of said years of \$80,000. A certificate was attached to the city tax book for 1906 the body of which is as follows:

"I, Lon L. Ashcraft, clerk of the county court, and secretary of the board of equalization and appeals within and for State and county aforesaid, do hereby certify, that the within and foregoing contains a fair, true and correct copy, in red ink, of all changes in real and personal property assessments within the city limits of the city of Carterville for the year 1906, as adjusted by the county board of equalization and appeals, and on file in my said office."

A substantially similar certificate was attached to the city tax book for 1907.

The record in the Pease case in the Jasper County Circuit Court was introduced by defendant. The petition in the ordinary form, for the recovery of city taxes for the years 1898 to 1902 inclusive, was filed September 15, 1903. The answer pleads substantially the same facts with respect to the condition and situation of the

land as in this case, and "that the pretended ordinance purporting to extend the corporate limits of the city so as to include the defendants, said land is unreasonable, unjust, and oppressive." The only ordinance appearing in the transcript of the evidence introduced in that case is a general ordinance entitled, "An ordinance changing and *diminishing* the present corporate limits of Carterville, Mo." It provided that the corporate limits as they then existed, and described as containing more than four and a half sections of land, including the whole of the original town, with the land in controversy, be changed and diminished to metes and bounds containing less than half as much land, but still including all the old town. The process by which the city grew to its larger estate does not appear in the record of that case. The judgment was for the defendant. The court refused, in this case, to instruct, at the request of the plaintiff, that it was not an adjudication against the right of the city to tax the land in question, and did instruct at its request as follows:

"The court declares the law to be that if the evidence in the case of the State of Missouri ex rel. Al Pease, City Collector of the City of Carterville, v. Center Creek Mining Company shows that the question of the original incorporation of the city of Carterville was not submitted to the court in the determination of said cause, and that the question of whether said land was included in the original incorporation of the said city of Carterville was not one of the issues in said cause under the pleadings and the evidence, but that the evidence in said cause shows that the question considered was the reasonableness of the corporate limits of the city of Carterville, as fixed by ordinance of the board of aldermen of said city as shown by ordinance No. 84, page 181 of the ordinance book of said city, then the judgment in the cause of State ex rel. Al Pease, City Collector of the City of Carterville, v. Center Creek Mining Company is not *res judicata* in the present

cause." It then gave judgment for defendant, which is now before us on this appeal.

I. The controlling question, and the one on which the decision of the trial court was placed, is whether or not the judgment in the Pease case estops the city from asserting that the land in question was subject to taxation for city purposes at the time these taxes were levied. There is much respectable authority to the effect that such an adjudication is only conclusive against the State as to the very taxes which were its subject, and does not extend to the incidental questions actually and necessarily decided in reaching the judicial result. This court has, however, adopted and followed the more just and reasonable doctrine that, in the absence of any constitutional or legislative declaration to the contrary, these rules, which it has established and which it enforces for the protection of the subject from vexatious and unnecessary litigation, should be and are binding upon the State itself. [Kansas City Exposition Driving Park v. Kansas City, 174 Mo. 425; New Orleans v. Bank, 167 U. S. 371; Nord St. Louis Turnverein v. Hagerman, 232 Mo. 693.] In the case last cited we said: "To our minds the matter was so exhaustively considered and so soundly reasoned in the Exposition Driving Park case, that no judicial excuse exists for a re-examination of its doctrine." We will assume, then, that the doctrine of *res judicata* and estoppel by judgment applies as well to cases of this character as to ordinary litigation between individuals, and consider its application from that standpoint. This was the view taken by the trial court in the instructions given and refused. Was it rightly applied?

II. There is no question in this case as to the identity of the parties with the parties in the Pease

case, or of the capacity in which they sue. The plaintiff in each is the State, and the relator the collector of the city of Carterville, suing in that capacity, while the defendant is the same. But the thing sued for in the Pease case was the amount of the city taxes for the years 1898 to 1902 inclusive, and the cause of action was its non-payment. The thing in issue and adjudicated was the liability of the land for those particular taxes, and when that was determined by the court and its determination had been embodied in its final judgment the very existence of the judicial branch of the government required that nothing should remain but to give effect to the judgment by final process. "The very essence of judicial power is that when a matter is once ascertained and determined it is forever concluded when it arises again under the same circumstances between the parties or their privies." [New Orleans v. Bank, *supra*.] The estoppel of the judgment embraces not only everything urged in support or interposed in defense of the cause of action in issue, but everything that might have been so urged or interposed; so that the judgment constitutes the ultimate measure of success on the one hand and of defeat on the other. While the defendant has the right to interpose as many consistent defences as he may think he has to the action against him, he has the equal right to plant his case upon the one he conceives to be the surest and most available, and thus avoid the trial of a swarm of possible issues which may involve him in almost endless expense and difficulty, and the courts charged with the hearing and determination of the case in much unnecessary labor. In doing this he only risks the subject-matter directly in issue in the particular suit, and does not run the risk of binding himself with respect to other matters by the fiction of an adjudication of things never tried or considered. Upon this point the Supreme Court of the United States in the New Orleans case, *supra*, quoting with approval from *Cromwell v.*

Sac County, 94 U. S. 351-353, said: "Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to the matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." This conclusion is supported in the case cited by an extensive collection of authorities from the same distinguished court which we have examined with much interest. In the light of the principles so stated we are to determine whether or not the questions involved in this case, a suit for city taxes for the years 1905 to 1909 inclusive, were "actually litigated and determined" in the Pease suit for the city taxes on the same land for the years 1898 to 1902.

III. The plaintiff, for the purpose of making out its case in the first instance, introduced not only its certified tax bill, but also the original record of an order of the county court of Jasper county, made April 16, 1877, incorporating the town of Carterville, consisting of twelve forty-acre tracts in compact form, of which the tract involved in this suit is one. The regularity of this order is not questioned. It states all the facts necessary to give the county court jurisdiction under the act of February 8, 1871 (Laws 1871, p. 85), which was in force at the time it was made. That the authority given the county court by this act is judicial is not an open question. [Kayser v. Trus-

County Court
Incorporating
Town:
Judicial Act.

tees, 16 Mo. 88; State ex inf. v. Fleming, 158 Mo. 558; Black v. Early, 208 Mo. 281, 303-4; State ex rel. v. Wilson, 216 Mo. 215, 277.] In the case last cited, in

Attack upon
Order of
Incorporation.

considering the action of the county court in the incorporation of a drainage district, this court said that "where such court, or a mere ministerial board for

that matter, possesses under the law jurisdiction of a certain class of cases, and is required to find the existence of certain facts, the law will presume, in a collateral attack upon the judgment, that such facts did exist, and that such court or board passed upon them as required by statute." In the Kayser case, which involved the incorporation of the town of Bremen under a law (General Statutes 1845, p. 1048) from which the Act of 1871 was copied, this court held that the county court having jurisdiction of the subject-matter and having declared the town incorporated, the validity of its existence could only be questioned by a direct proceeding in *quo warranto*, and that in a collateral proceeding (which was, in that case, an application to enjoin the collection of town taxes) it could not be shown that the charter was obtained by fraud or had been forfeited by misuser or nonuser. This could only be done by process on behalf of the State.

Of the doctrine of that case, we said in Black v. Early, *supra*, "The Kayser case has been followed by a long line of cases from that day substantially to this, and if any cases be found in our reports that strike or seem to strike a discordant note they have in turn not been followed."

It is not necessary to consider whether or not *quo warranto* would lie to inquire into the propriety of the incorporation by the county court of this particular forty acres of land into the town of Carterville. While we hold that the validity of that action was not a proper subject of inquiry in the Pease case, we will assume that if the question was before the court in any form

in that case, and was there litigated and decided, whether rightly or wrongly, the parties are estopped from questioning the force of that decision in this case.

**Matters to be
Pleaded.**

But the question of the validity of the judgment of the county court is not one that raises itself. This court has said that "to assail an order of the county court in the matter of incorporating a city or town, or to disturb the result of its judgment through the office of the writ of *quo warranto*, all the essential infirmities thereof, and iniquities therein resulting from the manner of its procurement, or the fraud of the court, must be alleged and proven with the same strictness that would be required in a bill in equity having for its object the amendment of the final judgment of any court of record brought about by fraud or collusion." [State ex rel. v. Fleming, *supra*.]

There was no attempt made in either the pleadings or the evidence in the Pease case to attack or put in issue the validity or regularity of the judgment of incorporation. In short, the defendant seems to have

**Ordinance of
Incorporation
as City of
Fourth Class:
Enlarging
Boundaries.**

assumed, as it now argues in its brief, that the ordinance of 1897 "changing and diminishing the present corporation limits of the city," ignored all previous existence of the corporation, and was equivalent, for all purposes, to the establishment of a new corporation, by ordinance instead of by judgment of the county court as then provided by law. [R. S. 1899, sec. 5257.] A complete answer to this is that the city had no such power. When the original town became a city of the fourth class, its jurisdiction was not affected, but its limits and boundaries remained the same after such organization as before. (*Id.*, sec. 5895.) The city had no power to interfere with these boundaries except to extend them over adjacent lands, or to diminish them by excluding territory therefrom. [*Ibid.*] The power to annex territory is *sui generis*

in the sense that it creates one of the interested parties to an adversary transaction the legislative agent of the other with power to bind its antagonist, who has neither voice in the creation of the officers who inaugurate the action, nor vote in the election by which it is confirmed. It is this reason upon which the doctrine that the reasonableness of such an ordinance is a subject of judicial inquiry in suits to enforce rights claimed thereunder is founded, and we have justly said that the doctrine runs like a thread of gold through our case law, and is too firmly buttressed on reason and authority to be now mined by hostile criticism. [State ex rel. v. Birch, 186 Mo. 219, and cases cited.] In pursuance of this doctrine the defendant pleaded in the Pease case, and introduced evidence for the purpose of proving, that the ordinance of 1897 was, so far as it might apply to this land by including it in the city limits, unreasonable and void. Neither by pleading nor evidence was the validity of the judgment of incorporation now before us questioned nor is there anything in that record suggesting that it was considered. We therefore hold that the trial court erred in its ruling that the propriety of the inclusion of this land in the original incorporation of the town of Carterville was a thing adjudicated in the Pease case, so that the plaintiff is estopped from claiming in this case that it is taxable for city purposes.

IV. The question remains whether the assessment for city taxes of 1906 and 1907 is invalid because it does not "conform" to the assessment for State and county taxes for the same years. The certification of this assessment by the county clerk, who is made by the statute the secretary of the county board of equalization and therefore its certifying officer, is undoubtedly the certification of the board, and a sufficient authentica-

Assessment
of Taxes:
City of
Fourth Class:
Valuation
not to Exceed
that for County
Purposes.

tion; but the corrected land list of the county assessor is the original record of the equalized assessment, and the city assessment must yield to this best evidence. [R. S. 1909, secs. 11372, 11397.] With this in mind and the Constitution and statute before us, we have no difficulty in the solution of this question. *

The statute under which the city assessment was made (R. S. 1909, sec. 9347) was intended to conform to that provision of section 11 of article 10 of the Constitution which requires that the valuation of property for taxation for town, city or school purposes shall not exceed the valuation of the same property for State and county purposes. It provides that "in cities of the fourth class, the city assessor shall jointly, with the county assessor, assess all property in such cities, and such assessment, as made by the city assessor and county assessor jointly and after the same has been passed upon by the board of equalization, shall be taken as a basis from which the board of aldermen shall make the levy for city purposes." It also provides that "the assessment of the city property, as made by the city and county assessor, shall conform to each other, and after such board of equalization has passed upon such assessment and equalized the same, the city assessor's books shall be corrected in red ink in accordance with the changes made . . . and so certified by said board, and then returned to the board of aldermen." In this case no attempt was made to conform to the method so prescribed, either in form or substance. The city assessor valued the land independently of the county assessor for each of the years in question at \$80,000, while the county assessor valued it for each of those years respectively at \$2000 and \$12000, which was raised by the county board of equalization to \$6000 and \$15,000 respectively. The record of this action, both of the county assessor and board of equalization, was ignored by the county clerk in the list certified by him to the board of aldermen. We are not called upon

to speculate as to the reasons of these officers for their disregard of the plain requirement of the Constitution and laws made to give effect to its provisions, nor can we make an assessment for them. We can only say that this record shows a total lack, both in form and substance, of a legal assessment of this land for the city taxes of 1906 and 1907 and there can be no recovery for them in this suit.

The judgment of the trial court is reversed, and the cause remanded for disposition in conformity with this opinion. *Blair, C.*, concurs.

PER CURIAM.—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All the judges concur.

THE STATE v. MISSOURI, KANSAS & TEXAS RAILWAY COMPANY.

In Banc, December 19, 1914.

1. **CONSTITUTIONAL STATUTE: Railroad: Discrimination in Passenger Fares: National Guard.** The National Guard when traveling on orders from the Governor travel at the expense of the State, and a statute which requires them to be carried at one cent a mile is a discrimination in favor of the State, and not one between "transportation companies and individuals;" and, therefore, said statute is not violative of Sec. 23 of Art. 12 of the Constitution, which declares that "no discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback or otherwise," since such constitutional provision does not apply.
2. ———: ———: ———: ———: **One Cent Fare: Sec. 14 of Art. 12: A Command is an Implied Inhibition.** A statute (Sec. 8396, R. S. 1909) which requires railroad companies to carry members of the organized militia, traveling on the order of the Governor, at one cent per mile, while they are authorized to charge all private individuals and other

officers of the State two cents per mile, is violative of Sec. 14 of Art. 12 of the Constitution of Missouri, which declares that "the General Assembly shall pass laws to correct the abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads of this State." That provision not only lays upon the Legislature the duty to do an express thing, but it lays upon it an inhibition not to do a diametrically opposite thing. The command being that the Legislature shall enact laws to prevent unjust discrimination, that command forbids the Legislature to enact laws whose effect is to produce a plain discrimination.

Held, by GRAVES, J., concurring, that Sec. 14 of Art. 12 is not the only provision of the Constitution which authorizes the Legislature to fix maximum passenger or freight rates; on the contrary, rate-making is a legislative matter, and the constitutional provision (article III) vesting the legislative power in the General Assembly gave full power to the Legislature to pass laws fixing maximum railroad rates of all kinds.

3. ———: **Discrimination in Favor of State.** Said constitutional provision applies to a statute which makes an unjust discrimination in favor of the State. Nothing in its alleged sovereignty or in the fact that by its Constitution railroads are declared to be "public highways," will serve to absolve the State from the application to it of its own Constitution and statutes. The constitutional provision forbidding unjust discrimination in passenger and freight rates is binding upon the State, and a statute which attempts to make such discrimination in favor of the State is invalid.
4. ———: ———: **Unjust: Arbitrary.** The mere fact that a legislative act fixes a difference in passenger rates does not necessarily constitute an unjust discrimination. If the difference in rates be based upon a reasonable and fair difference in conditions which equitably and reasonably justify a different rate, it is not an unjust discrimination. But a legislative act which requires railroads to carry members of the National Guard to attend target practice, or upon other military duty, at the order of the Governor, upon regular trains, without regard to number, at any hour of the day or night, and to give them all the privileges accorded to other passengers, but at one-half the price fixed by law for carrying others, prescribes an arbitrary and unjust discrimination, and is violative of Sec. 14 of Art. 12 of the Constitution.
5. ———: ———: **Rates Fixed By General Act Presumed to Be Reasonable.** A rate of two cents per mile for carrying all adult passengers, fixed by a statute enacted only a short time before a special act declaring the rate for carrying members

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of the National Guard shall be one cent, is prima-facie reasonable, and will be so held when the question of whether the one-cent rate fixed by the later act is an unjust discrimination is up for determination.

6. ———: ———: **As Affected By Public Utilities Act: Obiter.**

Courts do not determine questions which are not live issues and whose determination is not necessary for a proper disposition of the case in hand. Having reached the conclusion that the statute requiring railroad companies to carry members of the National Guard when on military duty at one cent per mile establishes an unjust discrimination and is therefore void, it is not necessary to determine whether under the Public Utilities Act of 1913 the Public Service Commission is given power to fix railroad passenger rates, or if it has been given such power it was an unconstitutional delegation of legislative power.

Held, by GRAVES, J., that the question of the power of the Public Service Commission to fix passenger and freight rates which railroads may charge is involved in this case and should be decided now.

Mandamus.

WRIT DENIED.

J. W. Jamison for defendant.

(1) Section 8396, discriminating by one-half in passenger fares in favor of the organized militia of the State, is arbitrary and capricious, and violates the express command of section 14 of article 12, Constitution of the State, which makes it the duty of the General Assembly to enact laws to prevent unjust discrimination in passenger tariffs on the different railroads of the State. For the same reasons, and on the further ground that said statute seeks to deprive defendant of the equal protection of the law, and to take its property without due process of law for the benefit and use of the State of Missouri, the officers and members of the organized militia of the State, and for the benefit of the United States and its National Guard, the law is in conflict with section 30 of article 2 of the Constitution of the State of Missouri, and section 1 of article 14

of the Amendments to the United States Constitution. Said statute is also in conflict with section 23 of article 12, Constitution of Missouri, which expressly prohibits discrimination by railroads in charges or facilities for transportation, between transportation companies and individuals, or in favor of either in that said statute expressly commands and requires such discrimination in favor of the organized militia and against all persons who are non-members of that organization. *Ex parte Gardner*, 113 Pac. 1054, 33 L. R. A. (N. S.) 956; *Railroad v. Smith*, 173 U. S. 684; *McCully v. Railroad*, 212 Mo. 1. (2) Section 8396 is an attempt to exercise the power of eminent domain, rather than the police power, as it takes private property for public use, that is, for the benefit and use of the State of Missouri and the United States and members of the organized militia and National Guard. The distinction between the two powers should be borne in mind. 22 *Am. & Eng. Ency. Law* (2 Ed.), 916, 938.

John T. Barker, Attorney-General, *Lee B. Ewing*, and *William M. Fitch*, Assistant Attorneys-General, for plaintiff.

(1) The one cent rate provided for the State to pay for carrying her militia is proper, and the statute is neither discriminatory in its effect nor unreasonable in its classification. There can be no unjust discrimination in a rate statute where the lower rate applies to the State itself. The State has the right to require the railroad company to give this service, the same as the State has the right to require it to pay taxes, to serve and promptly transport passengers and freight, to protect the people from injury as far as may be possible, as well as to do many other things of such nature. That provision of the Constitution relied upon by defendant to sustain this ground of its demurrer, does not say that the State shall not fix a rate for the

transportation of her own troops. All that is intended by the section of the Constitution relied upon by defendant is that the railroad company shall not be permitted to fix different rates of transportation for the same class of freight or passengers. *State ex rel. v. Simpson*, 118 Minn. 380; *Railroad v. United States*, 76 Fed. 186; *Interstate Commerce Comm. v. Railroad*, 145 U. S. 278; *Commonwealth v. Railway*, 187 Mass. 436; *Willcox v. Gas Co.*, 212 U. S. 19. (2) The third ground of defendant's demurrer charges that Sec. 8396, R. S. 1909, is in conflict with section 30, article 2, of Missouri Constitution, and section 1, article 14, of the Amendments of the United States Constitution, (a) for the reason that the classification made by said act is purely arbitrary; (b) and seeks to deprive this defendant of the equal protection of the law, (c) and to take its property without due process of law. The classification is not arbitrary, and we do not know in which Constitution or what part of either Constitution there is a prohibition against the State in making such classification; in fact, there is no classification as far as the State's right to fix maximum charges is concerned. There is only a reservation by the sovereign power of the State in dealing with the corporation to require the corporation to transport the State's troops or militia at a certain rate, when the defendant was licensed to do business in the State of Missouri, by accepting its license, it has agreed with the State of Missouri to perform this identical act. *Julian v. Star Pub. Co.*, 209 Mo. 67; *Harvester Co. v. Missouri*, 34 U. S. Sup. Ct. 859; *State ex rel. v. Simmons*, 118 Minn. 383; *State v. Railroad*, 242 Mo. 339; *Roeder v. Robertson*, 202 Mo. 522; *Chilton v. Railroad*, 114 Mo. 18; *Younger v. Judah*, 111 Mo. 303; *Railroad v. State*, 216 U. S. 262. (3) The fourth ground of defendant's demurrer is based upon sections 12 and 23, article 12, of the Constitution of Missouri. These only apply to railway companies and prohibit them from making certain

charges to the people generally, and do not prohibit the State in the exercise of the sovereign power from requiring a service to be rendered to the State at a less figure than is rendered to the public generally. *Willcox v. Gas Co.*, 212 U. S. 19; *Interstate Commerce Com. v. Railroad*, 145 U. S. 278; *Railroad v. U. S.*, 76 Fed. 189.

FARIS, J.—Mandamus, brought originally in this court. Plaintiff, upon filing a petition containing apt allegations, procured the issuance by us of an alternative writ of mandamus, the pertinent part of which reiterated the allegations of the petition, and, omitting caption and formal parts, is as follows:

“Comes now the State of Missouri and represents and shows to the court that the Missouri, Kansas & Texas Railway Company is a corporation duly organized and existing according to law and owning and operating a line of railway from Jefferson City to Nevada, Missouri, wholly within this State.

“Your petitioner further shows that this State has formed and maintains an organized militia known and designated as the National Guard of Missouri; and that, under and by virtue of section 8396 of Revised Statutes of 1909 of said State, it was and is the duty of all companies and corporations owning or operating lines of railroad in this State to transport said organized militia or National Guard over the lines of said railroads between points wholly within this State, at the rate of one cent per mile for each man belonging to said organization whenever said National Guard is ordered by the Governor of this State to travel on military duty in this State.

“Your petitioner further shows that on the 22nd day of May, 1914, a part of said National Guard, to-wit, Capt. W. S. Moore and fifteen men of Company L. Second Regiment infantry, was ordered by the Governor of this State to go from Jefferson City to Ne-

vada, in this State, on military duty, to-wit, for target practice at the Government rifle range near Nevada; that on said date Adjutant-General John B. O'Meara, by order of the Governor, and acting for this petitioner, applied to the said Missouri, Kansas & Texas Railway Company for transportation for the said sixteen members of said Company L, Second Regiment, National Guard, from Jefferson City to Nevada, over the line of said railway company at said rate of one cent per mile for each man so transported; that the distance from Jefferson City to Nevada over defendant's railway is 174 miles, and that said Adjutant-General tendered to said railway company the sum of \$27.84 for the transportation aforesaid.

"Your petitioner further states that said Missouri, Kansas & Texas Railway Company refused to accept said sum so tendered and refused to issue transportation to said organized militia, and failed and refused to transport said militia as by law it is required to do; and asserts that it will not in future transport said National Guard at said rate."

Defendants demurred to said alternative writ upon one ground and divers specifications, which demurrer that the said ground and the specifications thereunder may be clearly seen, we likewise set out, omitting caption and formal parts, to-wit:

"1. Because it does not state facts sufficient to constitute a cause of action.

"2. Because the one-cent militia fare law, section 8396, Revised Statutes of 1909 of Missouri, is in violation of section 14 of article 12 of the Constitution of Missouri, being an unjust discrimination against other passengers in the State.

"3. Because said one-cent fare law deprived defendant of the equal protection of the law and takes its property without due process of law, and is in vio-

lation of section 1 of article 14 of the Constitution of this State.

"4. Because said section is in violation of sections 12 and 23 of article 12 of the Constitution of this State, which prohibit discriminations in charges or facilities for transportation between companies and individuals, or in favor of either.

"5. Because said one-cent militia fare law is confiscatory and in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, and section 30 of article 2 of the Constitution of Missouri.

"6. Because the order to Capt. W. S. Moore and fifteen men to go to Nevada, Missouri, and engage in target practice was not military duty within the meaning of said section 8396, Revised Statutes 1909."

From the pertinent part of the alternative writ as we set it out above, and from the above demurrer thereto, the points up for ruling will be clearly seen.

The statute, the constitutionality of which is the only bone of contention, will be found set out at length in the subjoined opinion, to which reference is likewise made for further facts, should such become necessary.

OPINION.

It is patent that the demurrer to the alternative writ of mandamus is well taken, if, as defendant contends, section 1 of "An Act to establish the maximum rates to be charged by railroad companies for transporting the organized military forces," etc. (Laws 1909, pp. 368 and 369; now Sec. 8396, R. S. 1909), is unconstitutional. In the last analysis this is the only question in the case. Other matters of minor moment are urged, but none of the latter is of any decisive importance in a final determination of the real question in issue.

Statute and
Constitutional
Provisions.

In order that we may have the matter under discussion plainly before us, we set out said section 8396 below:

"Sec. 8396. Whenever it shall be necessary for the organized militia of the State, designated the National Guard of Missouri, to travel on any railroad between points wholly within this State on military duty, ordered by the Governor, the rate charged shall not exceed one cent per mile for the transportation of each officer and enlisted man, with not to exceed one hundred pounds of baggage or camp equipage, and the individual, company or corporation owning, operating, controlling or leasing such road or part thereof shall be limited to such compensation therefor, and shall not charge, demand or receive any greater rate or compensation for such service."

Defendant, to escape the force of the above section, says that it violates the provisions of section 23 of article 12 of our Constitution, which reads thus:

"No discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback or otherwise; and no railroad company, or any lessee, manager or employee thereof, shall make any preference in furnishing cars or motive power."

And that it also violates the provisions of section 14 of article 12 of the Constitution of Missouri, which thus provides:

"Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers. The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of

passengers and freight on said railroads, and enforce all such laws by adequate penalties."

Other specific contentions of unconstitutionality are also urged, as the demurrer shows, which we shall discuss when—and if—we reach them.

I. It will be noted that section 23, *supra*, forbids discrimination as between, or in favor of, transportation companies and individuals. The discrimination here confronting us is not between
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 In Favor
 of State.** "transportation companies and individuals," nor is it in favor of such companies or individuals. We judicially know that the organized militia of the State when traveling "on orders from the Governor" travels at the expense of the State, and that therefore the conditions present a case of discrimination in favor of the State of Missouri. The suggestion urged on us that the United States in the end recoups the State of Missouri for these outlays, does not affect the argument; so we need not inquire whether this be true or not. Since if it be so, said section 8396 makes, in the last analysis, a *prima-facie* case of discrimination in favor of the United States as against any and all persons who, not being members of the organized militia traveling on orders from the Governor, are required to pay fare at the rate of two cents per mile. Neither the State nor the United States is mentioned in said section 23, *supra*, so no ban thereby is laid against either, which forbids in their favor a discrimination. We do not think section 23 of article 12 of the Constitution is in point.

II. The applicable part of section 14, *supra*, of the Constitution, which defendant contends renders said section 8396 unconstitutional, is the inhibition contained

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in the words: "The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State." It is contended that, since the Constitution in plain terms requires the Legislature to "pass laws to . . . prevent unjust discrimination . . . in the rates of . . . passenger tariffs on the different railroads," by this language and the unmistakable command of its converse it forbids the Legislature to pass any law, the effect of which is to produce a plain, and an alleged unjust, discrimination. May the Legislature having by the express command of the organic law a duty laid upon it to do a certain thing, not only fail to do that thing, but without any other authority from the Constitution, do the diametrically contrary thing? We do not think so. Such a conclusion in the light of our Constitution would serve as the mother in logic of a pestiferous brood of vicious, absurd and outrageous laws, which like chickens would come home to us to roost and vex us. For if the Legislature may validly pass a statute compelling the railroads to carry members of the organized militia for one cent per mile, and thus save to the State at the expense of the railroads, one cent for each mile traveled, it may, by the same token, pass an act requiring such transportation to be furnished for one mill per mile; likewise it may pass a statute requiring all transportation, both of freight and passengers, moving at the ultimate expense of the State, to be furnished at a merely nominal cost. We bear in mind of course such exceptions, if any, as might arise from the constitutional provision which forbids the giving of "free passes or tickets at a discount" to State officers and others. [Sec. 24, art. 12, Constitution.]

Similar statutes, in the main features thereof, have been before the Supreme Court of both Kansas and

Minnesota. Though Kansas has no such constitutional provision as we have here under discussion, it was yet held in that State, *In re Gardner*, 84 Kan. 264, that a statute which required railroads to furnish transportation to the officers and men of the Kansas National Guard when traveling to perform military duty under orders from competent authority, was invalid, for that it denied to the railroads the equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States. In Minnesota, which likewise has no such section in its Constitution as section 23 of article 12, *supra*, a one-cent-per-mile-fare statute for the benefit of the organized militia and State naval reserves was held, in the case of *State ex rel. Simpson v. Chicago, Milwaukee & St. Paul Ry. Co.*, 118 Minn. 380, not to violate either the Federal or State constitutions in the respect that it took the property of the railroad without compensation, or without due process of law, or that it deprived it of the equal protection of the laws. That these opposite and contrary rulings are irreconcilable goes without saying, but in the view we hold of this case, in the light of the inhibition directed to our State Legislature by section 14 of article 12 of our Constitution, we are not necessarily called on to reconcile the wide differences existing in the views held by the able jurists who wrote these adverse holdings. While the precise contentions held in judgment in the cases of *State ex rel. Simpson v. Chicago, Milwaukee & St. Paul Ry. Co.*, *supra*, and *In re Gardner*, *supra*, to-wit, that our statute violates those Federal and State constitutional provisions guaranteeing due process of law, and the Federal Constitution's provision guaranteeing the equal protection of the laws, are all raised by defendant in the instant case, we need not discuss them; since we have another constitutional provision equally in point, and not subject to doubt and contrariety of ruling.

The Supreme Court of the United States, passing upon an analogous matter in the case of Lake Shore & Michigan Southern Railway Co. v. Smith, 173 U. S. 684, likewise held that a statute of Michigan requiring railroads to issue thousand-mile tickets and sell them at a price fixed by such statute, took the property of the railroad without due process of law and failed to afford to the railroad the equal protection of the laws, and thus violated the 14th Amendment to the Constitution of the United States. The Constitution of Michigan was not, of course, under review or there held in judgment; since it was not the province of the Supreme Court of the United States to pass upon whether the statute violated the Constitution of Michigan. The latter matter was for the courts of Michigan to determine. The statute of Michigan, so held to violate section 1 of the 14th Amendment, provided in substance that all railroads in Michigan, whether intrastate or interstate, should keep for sale and sell at all principal ticket offices one-thousand-mile tickets at a price not to exceed twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula; that such tickets should be non-transferable, valid for two years from the date of the purchase thereof, and whenever required by the purchaser should be issued in the names of such purchaser and his wife and children, designating the names of the purchaser and each member of the family on such tickets.

The Court of Appeals of New York in the case of Beardsley v. Railroad, 162 N. Y. 230, likewise held that a thousand-mile ticket law, similar to that held in judgment in Railway Co. v. Smith, 173 U. S. 684, was invalid because it violated the provisions of section 1 of the 14th Amendment to the Constitution of the United States. The identical point has been similarly ruled in other jurisdictions; in fact, in every jurisdiction to which our attention has been called, and in which the question has arisen. [State ex rel. McCue v.

Great Northern Ry. Co., 17 N. D. 370; Commonwealth v. Atlantic Coast Line Ry. Co., 106 Va. 61.] It may be objected that the opinions of the State courts following the ruling of the Supreme Court of the United States in the case of Lake Shore, etc., Ry. Co. v. Smith, *supra*, upon a Federal question, prove nothing of moment; that it is but a "piling of Pelion upon Ossa." This is conceded. The State courts are compelled to follow the Federal courts upon Federal questions. But it does show with some degree of certainty that the consensus of opinion is that the Supreme Court of the United States is still adhering to the views expressed in the Lake Shore-Smith case, *supra*, and that the case of Willcox v. Consolidated Gas Co., 212 U. S. 19, is not in conflict, as certainly in our views it is not in point therewith, though counsel rely with much assurance thereon, as likewise does the Supreme Court of Minnesota in the Simpson case, *supra*. Briefly, the Willcox case, *supra*, held that so long as the total income of an established gas company, monopolistic as to its occupancy of the field, furnished an adequate profit upon the capital and plant employed, it did not legally matter that as to some customers, namely, the city and its departments, the profit was not enough to do so.

So if by reason of paucity of provisions in our organic law we had been compelled to resort (as counsel among other points urges us to do) to the inhibitions of the 14th Amendment against the passage of any State law which deprives a person of his property without due process of law, or which denies to such person the equal protection of the laws, we could in the above cases, and that of *In re Gardner*, *supra*, find authority well grounded and well-reasoned for our holding. But the makers of our own State Constitution, apparently zealous to prevent discrimination and preserve fairness of treatment, not only placed in our organic law the two sections which we quote above and with which we began this opinion, but also section 12 of article 12,

forbidding discrimination in short as opposed to long hauls; section 24 of article 12, which forbids the giving of passes, or the sale of tickets at a discount to certain stated officers, and section 30 of article 2, which forbids that any person shall be "deprived of life, liberty or property without due process of law." We merely mention these provisions *arguendo* to point the moral that the Constitution-makers labored to prohibit discriminations, rebates, combinations, monopolies and unfair practices which might confer upon some patrons of railroads advantages not attainable by others. We are not saying that they apply to the instant case. On the contrary, we say they do not. We mention them to emphasize the frame of mind of the Constitution-makers.

While Alabama (Sec. 243, Cons. 1901), Kansas (Sec. 10, Art. 17, Cons. 1874), Colorado (Sec. 6, Art. 15, Cons. 1876), Georgia (Par. 1, Sec. 2, Art. 4, Cons. 1877), Illinois (Sec. 15, Art. 11, Cons. 1870), Mississippi (Sec. 186, Cons. 1890), Pennsylvania (Sec. 3, Art. 17, Cons. 1874), South Dakota (Sec. 17, Art. 17, Cons. 1889), Texas (Sec. 2, Art. 10, Cons. 1874), Utah (Sec. 15, Art. 12, Cons. 1895), Washington (Sec. 18, Art. 12, Cons. 1889), and West Virginia (Sec. 9, Art. 11, Cons. 1872), each has provisions in their several constitutions, either making it the duty of their Legislature to pass laws to prevent unjust discriminations in freight and passenger rates upon railroads and common carriers, similar to our own constitutional provision (Sec. 12, Art. 12, Constitution 1875), or, providing that no such discrimination shall be permitted; yet our

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attention has not been called to, nor have we been able to find, any case in either of these States on the precise point. Nevertheless, we feel neither

hesitation nor doubt that section 8396, Revised Statutes 1909, is invalid, though we bear in mind the strict rule we are enjoined to follow in declar-

ing a law unconstitutional (State v. Baskowitz, 250 Mo. 82; State v. Thompson, 144 Mo. 314); for it contravenes the provisions of section 14 of article 12 of our Constitution; provided we shall conclude that the discrimination compelled by its provisions is an "unjust discrimination." Let us look to this point.

III. We do not understand that the defendant contends against the authority of the Legislature reasonably to regulate its rates of passenger fare. This authority is well-settled; but likewise is it well-settled that the exercise of such right must be accomplished by means which do not result in depriving the railroads of due process of law or of the equal protection of the laws. This is the general rule, based wholly upon a consideration of the Federal questions involved, and without any specific reference, as a rule of decision, to our own constitutional provision (Sec. 14, art. 12, Constitution 1875) now being considered.

In the year 1907 the General Assembly of Missouri passed an act (Laws 1907, pp. 170 and 171) so amending section 1192, Revised Statutes 1899 (now Sec. 3232, R. S. 1909), as to fix the maximum fare permitted to be charged by railroads of defendant's class, for the transportation of adult persons, at two cents per mile, and for children under twelve years of age at one cent per mile. A reference to section 3232, as this section now appears in our statutes, will disclose that it does not upon its face specifically purport to fix or "establish *reasonable* maximum rates of charges for the transportation of passengers," authority for which is conferred by section 1 of article 12, *supra*, of the Constitution, nor is said section 14, either specifically or by the language adopted, in anywise referred to in this statute. Since, however, the only constitutional power to establish a reasonable maximum rate of charge for such service comes from said section

14 of the Constitution, and since said statute indubitably does, by its terms, fix a maximum rate of charges, it follows that the rate of two cents per mile per person so fixed by said section 3232, is *prima-facie* a "*reasonable* maximum rate." The fixing of the passenger fares at such sum is presumptively a legislative determination that such sum is "reasonable," that is to say, a reasonable compensation for the service rendered. [State ex rel. v. Public Service Com., 259 Mo. 704; Atlantic & P. R. R. Co. v. United States, 76 Fed. 186; In re Gardner, *supra*.] Such presumption is only *prima-facie*, and may, of course, be overthrown by an adequate showing in a proper proceeding of the value of the capital employed, and of expenses and receipts during an adequate period. [Railroad Co. v. Wellman, 143 U. S. 339; Dow v. Beidelman, 125 U. S. 680; Budd v. New York, 143 U. S. 517; Reagan v. Loan & Trust Co., 154 U. S. 362.]

In passing and before coming to a discussion of the main question, we may say that we cannot lend our concurrence to the bold position assumed by the State here: That neither the Constitution nor the statute forbidding discrimination relates to, or is binding upon, the State of Missouri. On the contrary there is, we think, nothing in its alleged sovereignty, or in the fact that by our Constitution railroads are declared to be public highways, which will serve to absolve the State from the application to it of its own Constitution and statutes. Yet we gather that some such view is involved in the position of learned counsel for the State. For our attention is called to the case of Atlantic & P. R. R. Co. v. United States, 76 Fed. 186, wherein the ruling is made that the said railroad may be compelled to transport soldiers traveling at the expense of the United States at a fare fifty per cent less than that charged private persons for similar transportation and service. The latter case is no authority for the view that the State by virtue of its inherent sovereignty

may exact from a common carrier a discriminatory rate, or a rate less than that charged to a private person for a like service. The railroad affected by the ruling in the case of *Atlantic & P. R. R. Co. v. United States*, *supra*, was what is called a "Land Grant Railroad," as to which the right to exact a lower rate for service rendered to the United States lies in a solemn legislative contract to this effect. It is, we think, surely too unreasonable for dignified discussion, to consider whether section 14 of article 12 of our Constitution, which declares railroads to be "public highways," nullifies by the use of the word "public" the provisions of section 21 of article 2, which forbids the taking of private property for "public use without just compensation." Some such idea must have been in the minds of the makers of the Constitution as this: That since section 20 of article 2 of the Constitution forbids the taking of private property for private use, the railroads could not exercise the right of eminent domain in the absence of a provision thus fixing, in a sense, their public character. The nature of this character and the sense in which such railroads are public highways, may be deduced by the curious, pursuant to the "method of exclusion" by an examination of the cases construing said "public highway" provision in section 14, *supra*. [*Construction Co. v. Wabash Railroad Co.*, 206 Mo. 172; *Nevada to use v. Eddy*, 123 Mo. 546; *Farber v. Railroad*, 116 Mo. 81; *Hyde v. Railroad*, 110 Mo. 272.] We need not here pursue it further.

Is the discrimination unjust? If a discrimination be apparent, as it is in the instant case, it does not follow as an inevitable corollary that it is an unjust discrimination. It needs neither a statute nor a constitutional provision to make unjust discrimination unlawful, for such discrimination was forbidden by the common law. [*Porcher v. Northeastern Railroad*, 14 Rich. (S. C.) 181; *Hannibal, etc., Railroad Co. v. Swift*, 12 Wall. 262; *Great Northern Railroad Co. v. Shep-*

herd, 8 Welsb. H. & G. (Exch.) 30; 4 Elliott on Railroads, sec. 1467.] While the question has arisen as a rule in cases brought by a shipper, injured in his business by such alleged discrimination, to recover damages (Sloan v. Pacific Railroad Co., 61 Mo. 24); or in proceedings against railroads for violations of statutory provisions forbidding discriminations (L. & N. Railroad Co. v. Com., 108 Ky. 628), we can yet see no valid reason for not applying the learning in the other cases as a decisive test in determining whether the one-cent-militia-fare statute is unjustly discriminatory as the term is used in our Constitution. For if a railroad be forbidden by law, or by the Constitution, to make unjust discriminations, it follows surely that it cannot by law be compelled to make them.

Arbitrary discriminations alone are unjust; if the difference in rates be based upon a reasonable and fair difference in conditions which equitably and logically justify a different rate, it is not an unjust discrimination. [Interstate Commerce Com. v. Alabama Midland Ry. Co., 168 U. S. 144; Interstate Commerce Com. v. Chicago G. W. Ry. Co., 209 U. S. 108; Bayles v. Kansas Pac. Ry. Co., 13 Colo. 181; Root v. Long Island R. R. Co., 114 N. Y. 300; Lough v. Outerbridge, 143 N. Y. 271; Hoover v. Pennsylvania Ry. Co., 156 Pa. St. 220.] Illustrating this view it was held in the case of Com. v. Interstate Con. Street Ry. Co., 187 Mass. 436, that a law requiring street railways to carry pupils of the public schools at rates not in excess of half the regular fare charged others for like hauls, was constitutional. In the course of its opinion, at page 438, the court said:

“The most important and difficult question in the case is whether there is constitutional justification for a discrimination between pupils of the public schools and other persons. If this were an absolute and arbitrary selection of a class, independently of good reason for making a distinction, the provision would

be unconstitutional and void. As was said by Mr. Justice BREWER in *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165 U. S. 150, 159: 'Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this.' The subject of compelling a railroad company to make an exception as to its rates, in favor of a certain class of persons, was considered elaborately in *Lake Shore & Michigan Southern Railway v. Smith*, 173 U. S. 684, and it was held that ordinarily the Legislature has not power to compel such action. The subject is also referred to in *Wisconsin, Minnesota & Pacific Railroad v. Jacobson*, 179 U. S. 287, 301. But if the difference is founded on a reasonable distinction in principle, such discrimination does not deny the equal protection of the laws. [Opinion of the Justices, 166 Mass. 589; *Pacific Express Co. v. Seibert*, 142 U. S. 339; *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89, 92.]

"In this case the selection of a class is not entirely arbitrary. The education of children throughout the Commonwealth is a subject for legislation which has occupied the thoughts of our lawmakers from early times. The duty of legislatures and magistrates to be diligent in the promotion of education, among all the people, is especially declared in chapter 5, section 2, of the Constitution of the Commonwealth. Compulsory attendance of children in the schools is provided for by our laws. [R. L. ch. 44, sec. 1.] Money may be appropriated by cities and towns for conveying pupils to and from the public schools. [R. L. ch. 25, sec. 15.] It cannot be said that the Legislature may not concern itself with the transportation of children to the public schools in the interest of popular education, just as it provides such children with books and other necessary articles. [R. L. ch. 42, sec. 35.] So far as this statute merely gives help to these pupils in connection with their acquisition of knowledge in the schools, it is jus-

tified. As a police regulation in the interest of education, the law may well require street railway companies to permit these children to ride to school upon their cars, without profit to the companies, provided it can be done without causing them loss. But if such a requirement involves expense, the cost can only be put upon the general taxpayers. It cannot be imposed upon the street railway companies, or upon that part of the public which pays fares to street railway companies. If, therefore, it plainly appeared that the enforcement of this section would cause expense to street railway corporations, which they must bear themselves, or put upon other classes of passengers in the form of increased fares to make good the loss from carrying school children at half rates, we should be obliged to hold that there was a taking of property without due process of law, through unconstitutional discrimination."

In the case of *In re Gardner*, 84 Kan. 1. c. 267, the Supreme Court of Kansas holding invalid a statute on all-fours with the instant one, in the course of its opinion, on the phase of discrimination, said:

"This court is not inclined to the view that the power of the Legislature is completely exhausted by a maximum rate regulation, and does not so interpret the decision quoted. But members of the National Guard cannot be segregated from the body of the State's citizens and made a preferred class, unless they sustain some relation to transportation by rail which, in the nature of things, indicates they should have the benefit of an exceptional rate. Classification, to be valid, must be based upon differences in character, condition or situation which lead to that difference in regulation which the statute undertakes to make. Thus, in the case involving a reduced rate for school children on street cars (*Commonwealth v. Interstate Con. Street Ry.*, 187 Mass. 436), the considerations which moved the court to sustain the rate were, among others, that pu-

pils go to and from the public schools at hours when other persons make little use of the cars; that they are of such a size and age that they occupy much smaller spaces than other passengers; and that the difference in rate was of so much importance to parents that twice as many pupils would ride at half rate as at full rate, so that the revenue of the carrier would not be materially reduced. This court neither approves nor disapproves the conclusion reached in that case, but the method employed for testing the classification upon which the rate was based is sound."

Approving a similar view upon the principle under discussion, the Circuit Court of Appeals in the Seventh Circuit, in the case of United States v. Chicago & N. W. Ry. Co., 127 Fed. l. c. 792, quoted with approval the rule laid down by Elliott on Railroads, viz.:

" 'Neither at common law, nor under the Federal statute, does the mere fact that there is a difference in rates necessarily constitute an unjust discrimination, since there is no such discrimination in cases where the conditions and circumstances are essentially different. It is the English rule that, in passing upon the question of undue or unreasonable preferences, various facts and circumstances must be considered, and that an undue preference, within the meaning of the statute, is not shown by mere evidence of a difference in charges. The Federal courts have substantially adopted the rule declared by the English courts.' "

If members of the organized militia averaged in weight but one-half that which other members of the traveling public weigh, or if they traveled at fixed hours or times when other business is slack; or if they carried far less, rather than far more baggage, equipment and *impedimenta*, than the ordinary traveling person carries; or if they traveled at known and definitely fixed times, in large bodies, or by the train-load; or if travel with them were a matter of personal volition, to be exercised or not as a low rate might in-

duce, rather than as a matter of stern duty transacted under order; or if the service of transportation required to be furnished were of an inferior class by a slow, unscheduled train, rather than that furnished to regular passengers who are compelled to pay two cents per mile, there might be some valid reason for saying as a matter of law that the plain discrimination presented is not an unjust discrimination. [Louisville, etc., Ry. Co. v. Wilson, 132 Ind. 517; Messenger v. Pennsylvania R. R. Co., 37 N. J. L. 531.]

Upon this identical phase of the case we are constrained to concur in what was said by the Supreme Court of Kansas in the similar case of *In re Gardner*, supra, at page 268:

“In accordance with the principle recognized, the Legislature might no doubt require that precedence be given to the transportation of troops over other traffic, that special facilities for the movement of troops be supplied, that special schedules be adopted and that other exceptional services be rendered whenever the public interest demands them. But the law in question has no such basis for the discrimination which it makes. Major Mills stood upon precisely the same footing, so far as the expected service to him was concerned, as any other individual. The times when members of the National Guard will travel are as uncertain as for other people. The number who will travel at any particular time is wholly indefinite. They come to the railroad station singly, in groups or in larger bodies, just as other citizens come singly, in groups or in crowds sufficient to load the cars of one or more trains. They occupy the same space and have the same privileges as other persons. Their movements are controlled by duty and not by special inducements, and the matter of rate can have no effect upon the volume of traffic. They are taken up, carried and set down without any mark or circumstance whatever to distinguish

them from the general public, or to distinguish the subject of their transportation from that of the general public, except that they carry orders for transportation without payment of fare and at reduced rates. Without any ground, therefore, for the classification, and without any regard to the reasonableness or unreasonableness of the regulation, the State simply demands that its troops be transported by rail at a purely arbitrary rate, which, so far as the principle involved is concerned, might be one cent per hundred miles or nothing at all. No other corporation or individual in the State is obliged to conduct business upon any such partial and unequal conditions or to make any such sacrifice for the support of the National Guard or any other public institution or purpose. Therefore the act denies the railroads the equal protection of the laws."

It fairly follows then that if two cents per mile per passenger was a reasonable rate in 1907, as the General Assembly by legislative act by all fair intents presumptively determined and fixed, then in the absence of a showing of some change in conditions (and there is no such here in the instant case) one cent per mile per adult passenger was not reasonable in 1909, when the special act favoring the organized militia was passed, and is not reasonable now. The law prescribing such a rate was clearly a discrimination and violative of the provisions of said section 14, which provides for the passage of laws to prevent discriminations, and by its plain, cogent converse forbids the passage of a law compelling the railroads to discriminate; when, as we have concluded above, this discrimination was unjust, for that it laid an extra burden upon the railroads.

We think this view could easily be sustained by the great weight both of authority and reason on the ground that it violates the provisions of section 1 of the 14th Amendment to the Constitution of the United States, as was done by the Supreme Court of Kansas

in the case of *In re Gardner*, supra, and in the analogous cases of *Lake Shore & M. S. Railroad v. Smith*, supra, and the four or five cases which followed the latter case; but fortunately we are saved from the embarrassment of deciding between the above cases and that of *State ex rel. Simpson v. Chicago, M. & St. P. Railroad Co.*, supra, by the provisions of said section 14 of our Constitution and so we may clearly hold it invalid for that it is in conflict with both the spirit and the letter of section 14, supra, of our Constitution.

IV. Having reached this conclusion we need not take up space to inquire whether said section 8396 is a bona-fide effort to establish rates and regulate railroad transportation, or whether it is purely a revenue measure, ingeniously designed to shift from the taxpayers and from the State revenue fund, to the railroads of the State, a portion of the cost of maintaining the organized militia. [*In re Gardner*, 84 Kan. l. c. 269.] The curious may read in the Kansas case, supra, an interesting discussion of this phase of the statute under criticism, and may learn therefrom under what conditions such special and unequal burdens may be imposed.

Other matters mooted, have by the conclusion reached become merely academic; for example, the contention that Captain Moore and his men were not engaged in such military duty as to bring them within the purview of the statute. If a statement of this contention, in the light of the fact that the Governor is the Constitution-appointed commander-in-chief of the National Guard, and upon a consideration of all the statutes providing for the government of the National Guard, does not plainly answer it, we will nevertheless leave it till it becomes a live question in a live case.

Furthermore, it is strenuously urged by learned counsel for plaintiff through many pages of an able

brief, that we erred most seriously in holding in effect that the power in a proper case to raise railroad rates, above the maximum fixed in section 3232, Revised Statutes 1909, is under our Constitution delegable by the Legislature, and that by the enactment of section 47 of the Public Service Commission Act (Laws 1913, p. 583), section 3232, *supra*, is conditionally repealed or temporarily suspended. [State ex rel. v. Public Service Com., 259 Mo. 704.] In this holding, it is contended, we overlooked the plain letter of the Constitution and in that case held (to quote the epigrammatic language of counsel) what we "thought the law ought to be rather than what it is." We do not think this question is in, or that it could ever get into, this case, having conceded, as we do, the *prima-facie* reasonableness of the two-cent rate, till its unreasonableness be demonstrated. Be this as may be, however, having come to a conclusion by another path, we will leave this question where State ex rel. v. Public Service Commission left it, till it again becomes the "lion in the path."

It follows therefore that the demurrer of defendant to the alternative writ of mandamus should be sustained, and since said writ was improvidently granted, it should be quashed, and the issuance of a peremptory writ denied. It is so ordered. *Lamm, C. J., Brown and Walker, JJ., concur; Woodson, J., concurs and also for reasons given in case of In re Gardner, 84 Kan. 264; Graves, J., concurs in separate opinion; Bond, J., dissents.*

GRAVES, J. (concurring).—I concur in the result reached by the majority opinion, and in most of the reasoning therein by our Brother FARIS, the writer thereof.

I agree that section 14 of article 12 of the Constitution directs the Legislature to pass laws to prevent "unjust discrimination" in passenger and freight

rates. I agree that the converse of this should also be true, i. e., that the Legislature should not itself pass a law which makes "unjust discrimination," and if it passes such a law it should be condemned as violative of the spirit of this constitutional provision. It should be noted that the terms of this constitutional provision is mandatory, in as much as it uses the word "shall" in a mandatory sense. However, there is no way of enforcing this mandate of the Constitution, except by the voluntary act of a Constitution-loving Legislature. I agree further that the Legislature in passing section 3232, Revised Statutes 1909, was attempting to carry out that other mandate of said section 14, article 12, of the Constitution which imposed upon the Legislature the duty to "from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers." I also agree that when it did pass this law it was *prima-facie* a reasonable *maximum* rate, and that without there being further showing, we have a right to say by comparison that the latter law is unjust and discriminatory, and therefore bad.

I do not agree to that portion of my brother's opinion whereat he says:

"Since, however, *the only constitutional power to establish a rate or charge for such service comes from said section 14 of the Constitution.*"

The italics are ours. This in my judgment is not the only constitutional source of power for the Legislature to pass maximum passenger or freight laws. Rate-making is a legislative power, and has always been so held and considered. When by article 3 of the Constitution the powers of State government were divided into three distinct departments, i. e., legislative, executive and judicial, and when by section 1 of article 4 the legislative powers were vested in "the General Assembly of the State of Missouri," such General Assembly became fully possessed with the power

to pass rate laws of all kinds, such things being legislative in character rather than judicial or executive in character. So that I say the legislative branch had full constitutional power to pass all kinds of rate laws, had there been no section 14 of article 12 of the Constitution. This may be important in some future litigation where the real purpose of section 14 of article 12 will have to be discussed, and for that reason I do not want to be recorded as announcing that said section 14 is the only constitutional authority for legislative action as to maximum rates in Missouri.

I do not agree to another conclusion which my brother has reached. I think that the constitutionality of section 47 of the Public Service Commission Act is fairly lodged in this case, and that we should thresh it out at this time. It is only a question of a short time when we will be forced to thresh out the question. If the public print is to be believed, then at this very time the railroads of the State are asking the Public Service Commission to raise their rates under said section 47, and with a showing that they are justly entitled to such a raise in rates. The constitutionality of that section has never been adjudicated by this court. We did hold in *State ex rel. v. Public Service Commission*, 259 Mo. 704, that the Legislature by said section 47 intended to authorize the Public Service Commission to raise rates above the maximum fixed by section 3232, *supra*, but we did not pass upon the question as to whether or not the statute, thus construed, violated section 14 of article 12 of the Constitution. This question should be passed upon now so that these railroads may know whether they shall go to the Public Service Commission or to the Legislature for their needed redress. The question is squarely lodged in this case, and this is an opportune time for the judgment of the court upon this extremely intricate question as to whether or not the Legislature can, under section 14 of article 12, delegate to any commission the right to fix

maximum rates. We purposely underscore the words "maximum rates." This delicate question might be stated otherwise, and perhaps be made plainer. If the Legislature had the constitutional power without section 14 of article 12 to fix rates, both maximum and minimum, then should said section 14 be construed as an express limitation upon the power of the Legislature to delegate such right to a commission or other body? But it is not my purpose to discuss the constitutionality of section 47 *supra*. It is my purpose to dissent from the majority views in postponing the evil day, when in my judgment the time is ripe for us to act now.

I therefore concur in the result, and in such portions of the opinion as above indicated.

THE STATE ex rel. McLAIN JONES v. WILLIAM
B. ROBERTSON et al., Judges of Springfield
Court of Appeals.

In Banc, December 19, 1914.

1. **CERTIORARI: To Court of Appeals.** On a *certiorari* to a Court of Appeals on the ground that its decision in a certain case is in conflict with the last previous decision of the Supreme Court on the subject, the case will not be considered by the Supreme Court as if it were before it on appeal. The holding must be confined to the issue; and whether or not the opinion of the respondent judges is in conflict with decisions of other courts of appeals, or some pertinent matters were not discussed, is outside the issue.
2. ———: ———: **Founded on Different Statutes.** A decision of the Court of Appeals founded on certain ordinances cannot be held to be in conflict with prior decisions of the Supreme Court founded on different statutes or ordinances.
3. ———: ———: ———: **Contract for Sewer: Previous to Detailed Plans and Materials.** Sec. 5848, R. S. 1909, does not require a city of the third class to define by ordinance the

dimensions of a district sewer and the materials out of which it is to be constructed prior to the enactment of an ordinance accepting a bid for the construction of the sewer, and hence a decision of a Court of Appeals founded on that statute and so holding, is not in conflict with a prior decision of the Supreme Court founded on an ordinance of Kansas City requiring detailed plans and specifications to be made and filed for the information of all persons desiring to bid on the work, and holding that such plans and specifications must be filed before the contract is entered into.

4. ———: ———: **Erroneous Ruling.** A judgment of a Court of Appeals cannot be quashed by the Supreme Court upon *certiorari* upon the sole ground that it is erroneous and places a wrong construction upon a statute. The jurisdiction to quash must be based upon the failure of the Court of Appeals to follow the last controlling decision of the Supreme Court upon the particular issue decided by the Court of Appeals.

Certiorari.

WRIT QUASHED.

McLain Jones pro se; I. V. McPherson and Wright Bros. also for relator.

The Springfield Court of Appeals in its opinion admits "that the dimensions and material of the sewer must have been prescribed by an ordinance," but contends that the contractor's bid and acceptance of the same by ordinance meets the requirements. There is nothing in the record to show that the requirements of the statute (Sec. 9241, R. S. 1909), "that said sewers shall be of such dimensions and materials as may be prescribed by ordinance;" there is nothing to show that the charter requirements of the city of Springfield were ever complied with, "that said sewers shall be of such dimensions and materials as may be prescribed by ordinance." But the record shows that there was no ordinance ever passed by the city of Springfield prescribing the dimensions and materials of the sewer in controversy. If the respondent's contention and the ruling of the Springfield Court of Appeals be correct

it abolishes all advertising for lowest and best bidders, and competitive bidding, for there is no ordinance antedating the proceedings, stating that the proposed improvement shall be of a certain kind of pipe, of certain sizes, the number of entrances and all other details from which an estimate could be made that would enable bidders to compete and know what was demanded and required of them. Neither the courts of this State nor of any other State have ever gone to this extent. *Waddell Inv. Co. v. Hall*, 255 Mo. 675; *State ex rel. v. Broadus*, 238 Mo. 189.

Barbour & McDavid for respondents.

The decision of the Springfield Court of Appeals is not in conflict with any of the cases cited by the relator. He lays much stress on the recent case of *Waddell v. Hall*, 255 Mo. 675. In that case, as in a number of others cited by him, the validity of tax bills issued under the charter of Kansas City was involved. Under its charter, section 2, article 8, that city is required to construct all sewers by contract let to the lowest bidder. No such requirement is made for the construction of sewers in the charter of Springfield.

BROWN, J.—*Certiorari* to quash an opinion filed and judgment entered by respondents as judges of the Springfield Court of Appeals, affirming a judgment of the circuit court of Greene county in the case of *City of Springfield to the use of E. Plummer, Respondent, v. McLain Jones, Appellant*. This last-named action will hereafter be designated as the Jones case.

This Jones case was instituted to enforce the lien of tax bills issued to pay the cost of constructing a district sewer in Springfield, a city of the third class.

It is contended by relator that, in the opinion complained of, respondents have held and decreed that it was not necessary for the common council of the city

of Springfield to define by ordinance the dimensions of a district sewer and the materials of which it should be constructed prior to the enactment by said council of an ordinance accepting a bid for the construction of such sewer, and that in announcing such holding respondents have ignored three controlling decisions of this court, which will be hereafter noted. That in thus failing to follow the last previous ruling of the Supreme Court respondents have violated section 6 of the Amendment to article 6 of our Constitution adopted in 1884.

OPINION.

I. Before making a further statement of the facts in this case or announcing our conclusions on said facts, we deem it worth while to say that both relator and respondents have presented the case in a somewhat confusing manner. Relator has invited us to try the cause as though it were here on appeal, emphasizing some issues which were not even discussed by respondents in their opinion filed and by trying to demonstrate that the opinion complained of is not in harmony with other decisions of the several courts of appeals; while respondents have also asked us to review evidence not set out in the opinion.

Practically all these things are outside of the issues of this case. Under our former rulings in this class of cases we will not review a case by *certiorari* in the same manner as though it were before us on appeal.

For the purposes of this action of *certiorari* we are not concerned as to whether the respondents considered all the issues submitted to them in the Jones case, nor whether they overruled or refused to follow some decision of the several courts of appeals.

In the very recent case of State ex rel. United Railways Co. v. Reynolds et al., 257 Mo. 19, we said:

“We will consider only the pleadings, evidence and facts as recited by the Court of Appeals whose judgment is sought to be quashed. It may be argued that should the judges of the Courts of Appeals fail to state the pleadings and facts correctly (a point upon which I personally have no fears), it might result in some individual case being decided incorrectly, and not in harmony with our previous rulings; but that would not militate against the primary object sought by section 6, article 6, supra, i. e., the uniformity of judicial construction on issues of law and equity in this State.”

Court of
Appeals:
Conflicting
Decision.

The construction of the sewer, out of which this litigation arose, occurred in 1901 and 1902, and in passing upon the legality of the tax bills upon which the judgment of the circuit court is based respondents were called upon to construe section 5848, Revised Statutes 1899 (in force at the time the contract for the sewer was let), which section, in so far as it pertains to the issues in the Jones case, reads as follows: “The council shall cause sewers to be constructed in each district whenever a majority of the property holders, residents therein, shall petition therefor, or whenever the council shall deem such sewers necessary for sanitary or other purposes, and said sewers shall be of such dimensions and materials as may be prescribed by ordinance, and may be changed, enlarged or extended, and shall have all the necessary laterals, inlets, catch-basins, manholes and other appurtenances.”

In their opinion construing this last-named section, respondents announced the following rule:

“The respondent concedes that the dimensions and the materials for the sewer must have been prescribed by an ordinance, but contends that the ordinance accepting the bid in this case meets the requirements of the statute. We shall uphold the contention of the respondent upon this point.”

This ruling relator contends is in conflict with the opinion of the Supreme Court in the case of Waddell Investment Co. v. Hall, 255 Mo. 675, which, to save space, will hereafter in this opinion be designated as the Waddell case.

In the Waddell case this court was construing the charter and certain ordinances of Kansas City, Missouri, one of which ordinances contained the following provision: "Before advertising for bids for doing any of the work mentioned in the first section of this chapter, the city engineer shall make out detailed plans and specifications for the work to be done, and keep the same on file in his office for information of all desiring to bid on the work."

No such provision as the one last quoted is found in section 5848, Revised Statutes 1899, and there is nothing in that section directly requiring the contract for sewer work to be advertised and let to the lowest bidder. It will be noted that the Waddell case construed an ordinance which required "detailed plans and specifications" to be made and filed "for information of all desiring to bid on the work," while the section construed by respondents merely recites that the "said sewers shall be of such dimensions and materials as may be prescribed by ordinance," without designating *when* that ordinance shall be enacted. So we find that the Waddell case construed laws so entirely dissimilar to the one which respondents were called upon to interpret that what we said in the Waddell case did not become a controlling decision for the guidance of respondents in the Jones case.

Another decision of this court which relator claims the respondents failed to follow is Kiley v. Oppenheimer, 55 Mo. 374, wherein it was held that the letting of a contract for improving a street without giving thirty days' notice of such letting, as required by an ordinance of the city of St. Joseph, Missouri, rendered tax bills issued for such street improvement void.

There is no such issue in this case. In the Oppenheimer case some highly technical rules were announced for ascertaining the validity or invalidity of tax bills for street improvements, but those rules are, in a large measure, superseded by the more rational doctrines announced by this court in the case of *Gist v. Construction Co.*, 224 Mo. l. c. 379.

The remaining decision of this court which it is contended respondents ignored in the opinion and judgment complained of is *Jaicks v. Sullivan*, 128 Mo. 177. That case was decided upon the proposition that the action was not instituted until after the lien of the tax bills in controversy in that action had expired by limitation, consequently it has no application here.

Respondents' opinion does not recite that there were no plans on file with the city clerk or engineer showing the dimensions and materials for the sewer; on the contrary, there is evidence recited in the opinion from which it might be inferred that the city council of Springfield had adopted specifications for all its district sewers several years prior to 1901, which specifications were accessible to all bidders, and that the contract for the particular sewer out of which this litigation arose was advertised and let to the lowest bidder in conformity with good business principles. With such facts before them if respondents had reversed the judgment of the circuit court they would have been placing form above substance.

It is neither appropriate nor necessary for us to decide whether respondents in their opinion complained of have placed a correct construction upon section 5848, Revised Statutes 1899, and we do not decide that point. A judgment of a Court of Appeals cannot be quashed by this court by *certiorari* because it is merely erroneous or places a wrong construction upon a statute or other law. [In re *Breck*, 252 Mo. l. c. 327.] Our jurisdiction to quash such an opinion or the judgment thereby directed must arise from the failure of such

Court of Appeals to follow the last controlling decision of this court on the particular issue decided by such Court of Appeals.

From what has been said it is apparent that respondents have not in the opinion complained of offended against the decisions of this court as asserted by relator in its petition for the writ of *certiorari*; therefore our preliminary writ heretofore issued herein will be quashed.

All concur; *Bond, J.*, in result.

CALVIN CARDER et al., Appellants, v. FABIUS
RIVER DRAINAGE DISTRICT NO. 3, D. A.
FRAZEE et al.

In Banc, December 19, 1914.

1. **MOTION TO STRIKE OUT: No Exception.** In order that the action of the court sustaining defendant's motion to strike out a part of plaintiff's petition may be reviewed on appeal, it was necessary that an exception be saved to the ruling and be incorporated in a bill of exceptions. A motion to strike out a part of a pleading cannot be considered a demurrer, or a part of the record proper, and cannot be preserved for review as other record matters.
2. **DRAINAGE DISTRICT: Fraud: Injunction: Misrepresentation as to Costs and Location.** The work of constructing and maintaining a drainage district cannot be halted for that some of the men who afterwards became supervisors, in circulating the petition for the incorporation of the district for signatures among the landowners, represented to them that the cost of excavation would not exceed seven cents per cubic yard and that the main drainage ditch would be located on low ground or along a certain line. At that time the men were not members of the board of supervisors, and any misrepresentations they made are not binding on the district subsequently organized.
3. ———: ———: **Cost of Construction.** The circuit court, in which the proceeding for the incorporation of a drainage district is begun and finally consummated, judicially determines, upon

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the presentation of a petition by landowners for articles of incorporation, whether the costs of the proposed improvement will be out of proportion to the benefits that will accrue both to the district as a whole and the several parcels of land therein; if the court finds the estimated costs will exceed the benefits it disapproves the report of the commissioners appointed to determine the question of damages and benefits, and thereupon the incorporation is dissolved; and these things the petitioners are presumed to know and have in mind when they attach their names to the petition. Therefore, the estimated cost of the landowners who circulated the petition, that the total cost will be so much per cubic yard or so much per acre, whether their estimate was too large or too small, cannot be used to imperil the corporation or to destroy it, or to stop the work of construction.

4. ———: **Conspiracy to Locate Ditch.** A conspiracy between the members of the board of supervisors to locate the drainage canal in such a way as to favor the interests of themselves and of other landowners, which the evidence shows failed of its purpose, the result being that the ditch was not located where they desired it located, will not authorize a decree enjoining the construction and maintenance of the ditch.
5. ———: ———: **Barren of Results.** A barren and abandoned conspiracy, sounding in words but void of substance in either acts or results, is not actionable, unless there is a statute making it actionable.
6. ———: ———: **Power to Restrain by Injunction.** Whether or not an alleged conspiracy formed between the supervisors after the district has been organized, to locate the drainage canal in a way to benefit most largely their own lands to the injury of others, will authorize a decree enjoining the construction and maintenance of the ditch, will not be decided where the evidence affirmatively shows that such conspiracy, if it ever existed, was barren of results. But it would seem that Secs. 5514, 5515, 5518a, R. S. 1909, make it unnecessary to resort to the extraordinary remedy by injunction, though that is not decided.

Appeal from Knox Circuit Court.—*Hon. Charles D. Stewart*, Judge.

AFFIRMED.

J. C. Dorian and *J. A. Whiteside* for appellants.

The board of supervisors alone has power to locate the ditch. R. S. 1909, sec. 5512. But the board

of supervisors has no right to so locate the ditch that the actual damages will be maximized and the actual benefits minimized to the extent of making the actual damages exceed the actual benefits. Laws 1911, p. 212, sec. 5518a. True this section furnishes a remedy where the estimated cost exceeds the benefits. But in this case appellants alleged and offered to prove that the estimate was false and fraudulent and that the item of the construction of the ditch would alone cost half as much again as it was estimated to cost; and where it is apparent and can readily be shown that the cost will exceed the benefits, the many trials, in this case about forty, of exceptions to assessments of damages and benefits are expensive and useless trials. The estimated cost would not be found to be inadequate until the work had progressed, irreparable damage done, and surely, then, there would be no adequate remedy. If the work was left unfinished great damage would be done. If it was finished it would have to be done by levying assessments in excess of the benefits, which the law does not warrant. Such a proceeding would be confiscatory, which is not authorized under any law of the land. The only adequate remedy is to restrain them, and that is the proper remedy. *Sears v. Hatchkiss*, 25 Conn. 171; *Zable v. Harshman*, 68 Mich. 270; *Mayor v. Meserole*, 26 Wend. 140; *Wright v. Shanhan*, 16 N. Y. Supp. 785; *Realty Co. v. Haller*, 128 Mo. App. 66; *Williams v. Harrison*, 135 Mo. App. 152; *Hartwell v. Armstrong*, 19 Barb. (N. Y.) 166; *Winkleman v. Drainage Dist.*, 170 Ill. 37; *Brush v. Carbondale*, 78 Ill. 74; *Mt. Carmel v. Shaw*, 155 Ill. 37; *Railroad v. Drainage Dist.*, 129 Ill. 417; *Bridge v. Drainage Dist.*, 140 Ill. 53; *People ex rel. v. Myers*, 124 Ill. 95; *Hosmer v. Drainage Dist.*, 135 Ill. 51; *School Dist. v. Young*, 152 Mo. App. 304. If the allegations of the petition which were stricken out by the court are true, and the proof offered by plaintiffs could have been made, then the defendants are guilty of misfeasance,

are violating the plain and manifest intent of the statute under which they are acting and are not proceeding in good faith, and the court should have heard the proof and granted the relief sought. What appellants alleged and offered to prove would have made a case such as entitled them to the relief sought. This conduct of the board will, if allowed to continue, bankrupt the district and the improvements will be a detriment to the district, and not a benefit as intended by the statute, and appellants and other landowners of the district will be required to expend a large sum of money for work which will be of no benefit, but an injury to them. If the board cannot be restrained, appellants and other landowners of the district are, truly, at the mercy of the board. Their holding of office will continue until they have carried out their plans. No election can be held without their calling it, and it is fair to presume that none will be held, until they have carried out their plans, judging the future by the past.

F. H. McCullough and *W. T. Rutherford* for respondents.

(1) All motions which have formed a basis of exceptions must be set out in the bill of exceptions, or where it appears in the record proper (as here) a call must be made in the bill for the motion itself. *Martin v. Est. of Nichols*, 63 Mo. App. 346; *Pearson v. O'Connor*, 151 Mo. App. 171; *Dienen v. Pub. Co.*, 232 Mo. 425; *Ashton v. Penfield*, 233 Mo. 419; *Shohoney v. Railroad*, 231 Mo. 142. (2) Matter in a pleading that does not state a cause of action or defense is open to a motion to strike out as well as to a demurrer. *Shohoney v. Railroad*, 231 Mo. 148; *Sapington v. Jeffries*, 15 Mo. 631; *Niedelet v. Wales*, 16 Mo. 215; *Bailey v. Cannon*, 17 Mo. 597; *Robinson v. Lawson*, 26 Mo. 71; *Ming v. Suggett*, 34 Mo. 365; *Howell v. Stewart*,

54 Mo. 407. (3) When a motion is to all intents and purposes a demurrer dispositive of the whole case on a matter of law, the rules relating to a demurrer may then be applied to such a motion. *Shohoney v. Railroad*, 231 Mo. 149; *Austin v. Lohring*, 63 Mo. 21; *O'Connor v. Koch*, 56 Mo. 258. (4) Where a new right or means of acquiring it is given, and an adequate remedy for violating it is given, in the same statute, then the injured parties are restricted to the statutory remedy. *Hickman v. Kansas City*, 120 Mo. 110; *State v. Bittinger*, 55 Mo. 596; *Baker v. Railroad*, 36 Mo. 543; *Soulard v. St. Louis*, 36 Mo. 546; *Leary v. Railroad*, 38 Mo. 486; *Railroad v. Bebout*, 15 Am. & Eng. Ann. Cases, 1145, and notes on page 1150. (5) The rule is that an injunction will not be granted where there is an adequate remedy at law. 22 Cyc. 769; *Planet Co. v. Railroad*, 115 Mo. 613; *McKee v. Allen*, 204 Mo. 674. (6) An injunction is a matter of grace, and not of right. *Johnson v. Railroad*, 227 Mo. 450; 22 Cyc. 746, 749. (7) Plaintiffs have an adequate remedy provided by statute for such injury and damages as they or any of them may sustain. Secs. 5517, 5518, R. S. 1909; Sec. 5518a, Laws 1911, p. 213; Secs. 15, 16, 29, 36, Laws 1913, pp. 240, 241, 250, 253; *Drainage Dist. v. Richardson*, 237 Mo. 49; *Railroad v. Drainage Dist.*, 237 Mo. 86; Laws 1913, pp. 233-267.

FARIS, J.—Injunction suit by Calvin Carder and twelve other taxpayers and owners of real estate in defendant drainage district, against the said district (called hereinafter for brevity, the district), and D. A. Frazee and three others as supervisors thereof. Object of the action is to enjoin defendants from constructing and maintaining its drainage ditch as proposed in the plan of drainage filed and adopted. Plaintiffs on a hearing upon the merits were cast and have appealed so far as we note, duly.

Carder v. Drainage District.

For a better understanding of the case and to better illustrate an alleged error based on the action of the court *nisi* in striking out a part of plaintiffs' petition, we copy same below, caption, descriptions of land and alleged proper and improper ditch routes, verification and formal parts, omitted:

"Plaintiffs state that Fabius River Drainage District No. 3 is a drainage corporation, organized and existing under and by virtue of the laws of the State of Missouri.

"That defendants D. A. Frazee, J. S. Barr, Geo. H. Walker and S. R. Short are members of the board of supervisors of defendant district.

"That plaintiffs are the owners of real estate in the counties of Knox and Clark, in the State of Missouri, the same being within the limits and boundary lines of said drainage district and a part thereof, and said lands being as follows:"

[Here follow descriptions of the lands of plaintiffs.]

"That the board of supervisors of this district has filed, according to law, the plan for drainage, including within its scope the proposed location of the main ditch and topographical survey, the location of said ditch being as follows:"

[Here follows proposed route of ditch as the filed "plan for drainage" locates it.]

[a] "That the topographical survey shows by the elevations and depressions of the land that the location of the proposed ditch embraced in said plan for drainage is impractical and will result in no benefit, but will result in detriment to said drainage district, and will work irreparable damage to plaintiffs; that said ditch, if located as proposed in said plan for drainage, will not carry off the surplus overflow water, which will collect and stand on plaintiffs' lands; that ditch, if so located, will be on higher ground than the lands of plaintiffs and other lands in said district; will cross the old

creek or river many times, which will cause said creek or river to close up and cease to flow, and by destroying the outlet, the overflow and surplus water will collect on the lands of plaintiffs and leaving to plaintiffs no outlet for said water in lieu thereof.

“That when the old creek or river is closed up, as it will be if said ditch is located as proposed in said plan for drainage, there will be no outlet for the waters of Long Branch, Betram Branch, Vernon Branch and other streams which come into the creek or river from the south, thereby causing the waters from said streams to overflow and remain on the lands of the landowners in said district and those of plaintiffs.

“That said ditch, if so located, will be much more expensive to construct and will cause the damage to plaintiffs’ and other lands in said district to be much greater than if said ditch was properly located as aforesaid.

“That there will be no benefits accrue to plaintiffs’ or other landowners in said district; it will render worthless much of the lands of plaintiffs and will be a detriment and damage to the lands of plaintiffs and not a benefit.

“That said topographical survey shows that the proper location for said ditch would be as follows:”

[Here follow plaintiffs’ personal views of the proper route for the proposed ditch.]

“That if said ditch is located as last above described, it will be the more practical and beneficial location, and be of the most benefit to said district and to plaintiffs and will benefit the landowners in said district and plaintiffs far in excess of the damages and cost of construction; that the benefits will be greater, the damages less and the cost of construction much less, so that the ditch will be a benefit to the district, and the benefits will exceed the damages.

“Plaintiffs state that if said ditch is located as proposed in said plan for drainage, irreparable dam-

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age will be done plaintiffs, as above set forth, and the expenses, damages and cost of constructing said plan for drainage will exceed the benefits derived therefrom and will cause said district to become insolvent and unable to meet its liabilities. [b].

“Plaintiffs further state that when the petition for the organization of said district was circulated, it was fraudulently represented to the plaintiffs that the ditch would be located on low grounds, on a route similar to the one hereinbefore described as the most practical, beneficial and proper route, where it would be the most benefit and the least damage to plaintiffs and to the district, where the cost of construction of the ditch, it was represented, would not exceed seven cents per yard; that plaintiffs signed said petition relying upon said false and fraudulent statements made to them, and believing the same to be true; that after the said district was organized and defendants D. A. Frazee, J. S. Barr, George Walker and S. R. Short were elected on the board of supervisors, the said defendants fraudulently conspired with each other to locate the ditch where they thought it would be most beneficial to themselves, without regard to the interests of the plaintiffs and the rest of the landowners in said district, and by so conspiring together, did locate the ditch where the same, in their opinion, would be most beneficial to themselves, regardless of the interests of the plaintiffs and the other landowners in the district, and that said ditch, as located by them, by fraudulently conspiring together as aforesaid, is against the interests of plaintiffs and the other landowners of said district, will cause the said ditch to be a damage and not a benefit to plaintiffs and the landowners of said district, will cause the damage to exceed the benefits, thereby rendering the district insolvent and unable to pay its liabilities and will do to the lands of the plaintiffs great and irreparable damage, for which they would have no adequate remedy at law.

“Wherefore, plaintiffs pray the court to enjoin the defendants from constructing and maintaining the said ditch as proposed in said plan for drainage.”

Defendants moved to strike out all that part of plaintiffs' petition which we may aptly designate as being included between [a] and [b] marked on the above petition, for the reasons: (a) that it failed to state facts which constitute a cause of action against defendants; (b) that there is no equity stated in the part asked to be stricken from the petition, and (c) that plaintiffs have an adequate remedy at law for all of the matters set out in the said part of the petition.

The court sustained the motion to strike out the portion of plaintiffs' petition above indicated, but no exception was properly saved by plaintiffs to this action.

Defendants' answer was a general denial. The case was tried by the court upon the issues of fraud remaining in plaintiffs' petition, and judgment rendered for defendants dismissing plaintiffs' bill.

The facts shown upon the trial of the case, as we have with much difficulty gathered them from a meager and most unsatisfactory record, are substantially that defendant district is organized under the provisions of article 1 of chapter 41 of the Revised Statutes of 1909, as amended by the Act of 1911; that plaintiff Calvin Carder, and defendants D. A. Frazee, J. S. Barr, George H. Walker and S. R. Short compose the board of supervisors of said district, and that plaintiffs are taxpayers therein, owning altogether some 1300 acres of land in the district, which will be affected for good or ill by the proposed improvement. Upon the filing by the engineer of the district of his proposed plan of drainage therefor, divers objections to the whole and to parts of it having to do with the location of the main ditch, and having their foundation in the respective personal interests of the super-

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visors, were urged against it. In fact, to state it in the ingenuous language of some of the witnesses, the supervisors "fell out." Oil upon the troubled waters took the form of an informal agreement, likewise ingenuously and mayhap sarcastically referred to by counsel as a "gentleman's agreement," pursuant to which two other civil engineers were to be selected, who were to go over the proposed ditch locations and with the engineer of the district, one Weigner (or Weiner, it repeatedly occurs both ways in the record), were to decide which location of some three proposed and disputed ones should be adopted. These engineers accordingly went over the district, reported unanimously in favor of said engineer Weigner's location of the ditch and plan of drainage, and the district approved and adopted the same, plaintiff Carder inferably dissenting, though of a formal dissent the record is silent.

Other facts will become pertinent during the discussion of the points mooted, but all such can with better understanding be set out in the opinion in connection with the points up for ruling.

I. Plaintiffs complain that the court erred in striking out of their petition the portion thereof indicated in our statement of facts. We need not discuss the merits of this contention, since it has not been preserved for our review as required by law; no exceptions to the act of the court having been preserved in the bill of exceptions, the place wherein such matter ought to be. When the whole of a pleading is stricken out on motion, there has, it is true, grown up a practice, not legally allowable, but tolerated, to permit such motion to stand in lieu of a demurrer, which latter, as is well-known and well-settled, preserves itself for review as a part of the record proper. But that was not the case here. Only a part of the petition of plaintiffs was stricken

**Motion to
Strike Out.**

out by this motion; the court's action thereon leaving one ground of relief still in the petition. In such case the authorities all hold that the matters complained of are not in the record unless made so by incorporating them in a bill of exceptions. [Parkyne v. Churchill, 246 Mo. 109; Shohoney v. Railroad, 231 Mo. l. c. 142; Ewing v. Vernon Co., 216 Mo. l. c. 686; Paving Co. v. Benz, 81 Mo. App. l. c. 248.]

II. It is contended that the court erred in finding the issues for the defendants and in dismissing the plaintiffs' bill. This is a very comprehensive contention, to be resolved by a consideration of the whole of the competent evidence in the case, since the action sounds in equity. Let us look to this.

The gravamen of the charge left in the petition after a part thereof was stricken out, is fraud. This fraud, according to the petition, consisted in certain alleged false representations made by defendants Short and Frazee while they were circulating for signatures of landowners the petition for the incorporation of the district, to the effect (a) that the work of draining the lands in the district would cost only seven cents per cubic yard of earth excavation; (b) that the main drainage ditch or canal would be located on low ground, and (c) that the defendants Barr, Frazee, Short and Walker as supervisors of the district, conspired together to locate the ditch at an unfit location, beneficial only to said defendants and in entire disregard of the interests of the district and of the taxpayers thereof and of these plaintiffs.

It is clear from the allegations of the petition that the alleged false and fraudulent misrepresentations touching cost and location of the ditch, were made by defendants Short and Frazee before the incorporation of the district and while the proposed articles of association for its incorporation were being signed by

the petitioning landowners. [Sec. 5496, R. S. 1909.] It is utterly idle to urge that a proposed work of much-needed drainage can be halted by an injunction for such a reason. At the time of the making of the alleged representations neither Short nor Frazee was a member of the board of supervisors, nor could there have been at such time, regard being had to the statute controlling, any reasonable assurance or expectation that they ever would be.

Defendant district was organized under the provisions of article 1 of chapter 41 of the Revised Statutes of 1909, as amended by the Legislature in 1911. [Laws 1911, pp. 206 *et seq.*] We need not use up space in setting out all of the several numerous sections of this law either in full or in substance. They are found in the statutes and in the session acts; the curious may read them there. Briefly we shall refer to some of them as they applied when this district was organized, and as they read prior to the repeal thereof, and the re-enactment of an entirely new article by the 47th General Assembly. [Laws 1913, pp. 232 *et seq.*] Extended comment would but tend to confuse, regard being had to the many changes made in these statutes in 1913, though we bear in mind the provision in the re-enactment of 1913 that at the election of the supervisors, the remedies provided are cumulative. [Sec. 62, p. 266, Laws 1913.]

Section 5496 provided that upon the signing, by the owners of a majority of the acreage of a contiguous body of swamp land situate in one or more counties, of articles of association, containing certain allegations, not here pertinent, praying for incorporation as a drainage district, the same shall be filed in the office of the clerk of the circuit court of the county containing the greater area of such swamp land.

Section 5497 provides that thereupon the said clerk of the circuit court shall issue summonses to all owners of land in the proposed district, except those

who have signed said articles of association. These summonses are issued as now provided by law and are served as summonses are served in civil cases. Non-residents may be notified by publication.

Section 5499 provides for the filing of objections in the circuit court at the return term (Sec. 5498, R. S. 1909) by any nonsigner who has been summoned or notified; which objections are limited by this section "to a denial of the statements in the articles of association." These objections having been tried summarily by the court, the court (only, if he shall of course overrule all objections) by an order duly entered of record, thereupon adjudges the proposed district to be a public corporation (*conditionally* in the sense to which we shall later refer). [Sec. 5518a.]

Section 5507 provides for the calling, by the clerk of the circuit court in which the drainage district is incorporated, and for the holding, of an election by the landowners of a board of five supervisors, who hold such office (as they subsequently determine by lot) for one, two, three, four and five years respectively, and until their successors are elected and qualified.

Section 5511 provides for a "board of engineers" to be appointed by and with the approval of the board of supervisors, whose duty it is, after making surveys, both plane and topographical, to prepare and submit to the said board of supervisors "a complete plan for draining and reclaiming the lands in said district" from overflows and floods.

Section 5512 provides for the filing of the final report and plan of reclamation of the board of engineers, with the board of supervisors, and for the adoption of such report and plan by the said board of supervisors, after consultation, informally, with the engineers and with such others who may be sufficiently interested as to be present. After the adoption of such report and plan by the supervisors, it becomes the official "plan for drainage" of the district.

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The record in this case shows that all of these things were done substantially as the statute requires, as shown by the epitome of the steps provided for by statute, as we set it out. The petition solemnly admits that "the plan for drainage was filed according to law." We are asked, nevertheless, to enjoin the district from digging the ditch where the plan of the board of engineers, which was lawfully adopted by the board of supervisors, fixed and located it, for the alleged reason that when the signatures to the articles of association were being gotten (section 5496, *supra*) by defendants Short and Frazee (who happened afterward to be elected two of the supervisors) the said Short and Frazee fraudulently misrepresented the cost of the proposed work, and also the location of the ditch, by promising that it should be located, as the testimony of the witnesses indefinitely expresses it, on "low ground." We might leave this contention where the learned trial judge left it, on the ground that the evidence adduced by plaintiffs does not sustain or even tend to sustain their contention. But the question of whether a drainage district can be thus blocked and practically destroyed by adventitious facts such as are here complained of—by loose and untruthful statements of the circulators for signatures of the articles of association—is well lodged in the case and ought to be ruled on. We do not think it can be. The whole trend of the statutory procedure and all of the safeguards of judicial judgments and decrees provided by law and above referred to, as likewise others below referred to, would seem to forbid any such view. The circuit court in which the proceeding is begun and by which it is in the end incorporated and at last adjudged, judicially determines whether the cost of the proposed improvement is out of proportion to the benefits accruing both as to the whole district and in severalty as to the parcels of land in the district. If he determines that the estimated cost of the improve-

ment required to reclaim the land exceeds the benefits, he disapproves the report of the commissioners (appointed to determine the question of damages and benefits, sec. 5514), and thereupon the incorporation is dissolved (Sec. 5518a); the thing we held in mind when it was said *supra*, that the decree incorporating a drainage district is a *conditional* one—the condition being that it shall in the end be judicially determined that the benefits of the proposed improvement shall at least equal the cost thereof. The petitioning landowners, as all of plaintiffs were, sign the articles of association for incorporation, not in ignorance, but with full knowledge impliedly, of the statutes and procedure under which such a drainage district as this is begun and moves and has its being.

It is not a question of total cost, or cost per cubic yard of excavation which is held in mind, or ruled in the organizing court's judgment, but the proportion which such cost, whether upon a cubic yard, acreage or other basis, bears to the amount of the benefits accruing. Therefore testimony with which—and only with which—this record is filled, to-wit, that the work would (as the alleged fraudulent representations put it) cost but from two to six dollars per acre, and the excavation of the ditch but seven cents per yard, is worse than idle.

It would be against public policy to permit important matters like the organization of great (or even small) drainage districts, which are corporations and political subdivisions of the State (*Morrison v. Morey*, 146 Mo. 543) to be imperilled or likely to be utterly destroyed, after years of labor in organization, by the mere argumentative and guessing estimate of him who carried about the proposed articles of association for the purpose of having same signed by the petitioning landowners. The signers of the articles, as we have said before, sign with the full knowledge imputed to them of the statutes and legal procedure and final

court judgment which make the work, and the prorating of the assessment and levy of the money to pay for it, a finality. Even if (though the view is plausible) the circulator of such proposed articles of incorporation be not acting as the agent of all who sign rather than as the agent of a district not yet organized and which may never be organized, or which being organized (conditionally) may be by decree of court dissolved, is it either wise, or good law or a matter of safe and sane policy to so imperil a drainage district because of loose puffing and a mere known and palpable guess? Other reasons might be given, but to my mind the matter cannot be made clearer by discussion. We apprehend that learned counsel have been misled by the rule which applies to promoters of private corporations. This contention is disallowed.

III. If alleged misrepresentations made before the conditional organization of a district by those who later accidentally, in a way, become supervisors, cannot constitute such fraud as will destroy the district, will an alleged conspiracy, on the part of the supervisors *after* the conditional, but *before* the final organization of the district, to locate the ditch so as to favor their own interests without regard to the interests of the district and of other landowners, have this effect?

This is a large and comprehensive question, which we are happily saved from either considering on the cold law or from answering; since there is no proof in the record of any such conspiracy, neither is such a conspiracy to be inferred from the evidence. On the contrary the testimony offered by plaintiffs shows affirmatively and that of defendants likewise, that neither defendant Barr nor Walker got the ditch located where they desired it to be. These two defendants, with the plaintiff Carder, constitute a majority of the board of supervisors, and it is patent that if there was a conspiracy formed it was barren in producing the result

charged in the petition of plaintiffs herein, namely, that defendants located the ditch to favor their own interests in utter disregard of the interests of plaintiffs and of the district itself. A mere barren and abandoned conspiracy sounding in words but jejune of acts or results, is not actionable, absent a statute so declaring. [Hunt v. Simonds, 19 Mo. l. c. 588; Darrow v. Briggs, 261 Mo. 244.] Moreover, there is no proof that the interests of the district have been disregarded or that the ditch has not been located at the best and most advantageous place possible. There are to be found in the testimony loose and indefinite statements that the ditch was agreed to be located on "low ground," "away from the creek," and that the location approved by the majority of the defendant supervisors was on high ground and along, near to and in places partly in the said creek. But there is not a word from any witness who knows or who pretends to know, or from any expert (and certainly no proof by actual physical demonstration, for the ditch has not yet been constructed) that it is not located at the very best place possible for it to be in order to do the work of drainage and reclamation in the best and most competent manner. On the contrary, the plaintiffs offered the report of the board of engineers in which it was iterated and reiterated, both affirmatively and by repeated inference, that the location attacked here by plaintiffs, is the very best to be found. So upon the facts we think the court *nisi* was correct in his findings on this phase of the case and on the whole case.

We need not therefore carefully examine whether section 5518 precludes a suit in equity of this sort when it affords full and ample remedies by providing that any owner of land, upon the coming in of the report of the commissioners, who are appointed by the circuit court to assess damages and benefits (Secs. 5514 and 5515, R. S. 1909) may file exceptions thereto "to any assessment for either benefits or damages," and

which exceptions are required to be heard by the court summarily and to be so determined as to carry out liberally the purposes and needs of the district. And furthermore, that if the court find that any lands included in the district will not be benefited by the improvement proposed in the plan adopted, he is required to strike out such lands from the district and order that they be no longer taxed, and that he may, all exceptions having been determined, amend and modify, and thereupon approve and confirm, the report; but if on the contrary, following the provisions of section 5518a (mentioned and discussed, *supra*, in another connection), the court finds the estimated cost of the proposed improvement to exceed the benefits, his bounden duty is to disapprove the report, and *ipso facto*, upon the settlement of the costs, the district becomes dissolved. These considerations would seem to render unnecessary a resort to the extraordinary remedy by injunction; but for lack of proof, we suggest it without finding ourselves forced to decide it now, nor till a case shall arise wherein the facts shown lodge it firmly. Doubtless a condition might arise under our statute, (Sec. 2534, R. S. 1909) or even under the ancient equity jurisdiction, which would call for the restraint by injunction of a board of supervisors; if for illustration, after the day for a hearing and relief pursuant to statute had passed, such board were proceeding in violation of law, or in bad faith, to the damage of the district, or of the taxpayers having lands therein. But such a condition is not now before us.

Other points as to the admission and rejection of evidence are raised, but they are either not borne out by the record or would not affect the result if they were so borne out. It follows that the case should be affirmed. Let this be done. All concur.

**AUGUST HUNICKE, Administrator of Estate of
FRED R. HUNICKE, v. MERAMEC QUARRY
COMPANY, Appellant.**

In Banc, December 19, 1914.

- 1. PHYSICIAN: Services Rendered at Request of Third Party.** Where a physician or surgeon renders services to one at the mere request of a third party on whom there rests no obligation to provide such service, the law will not imply a contract on the part of the person receiving the service to pay therefor.
- 2. NEGLIGENCE: Injury of Employee: Emergency: Duty of Master to Procure Medical Treatment.** When an employee is engaged in a dangerous work for the master and, while in the performance of his duties, is so badly injured that he is thereby rendered physically or mentally incapable of procuring medical assistance for himself, the duty is devolved upon the master, as a matter of law, to procure such assistance for him, with reasonable diligence and in a reasonable manner, through the agency of such of his employees as may be present at the time; and a violation of that duty is negligence, for which the master must respond in damages, if there is evidence tending to show that the negligence was the proximate cause of the injured employee's death.
- 3. ———: ———: ———: ———: Diligence: Question for Jury.** Deceased, a young man twenty-three years of age, was in the employ of defendant at its stone quarry about two miles from a railroad station, and thirteen miles from a city station, near which was a hospital. From the main line of the railroad to the stone quarry was a railway track maintained by the quarry company, and as a coal car was being transported over said track, the young man was struck by a moving car, the bone of his leg, six or seven inches below the hip joint, was badly broken and crushed, a large hole torn in the flesh, and the skin, veins and arteries lacerated, followed by a profuse flow of blood. The superintendent by telephone called upon a physician at the railroad station to come quickly, who replied that it was impossible for him to leave a dying patient, and directed that the injured man be placed upon a hand car and brought to the station, and promised if that were done he would treat him there; and an hour later the call and reply were repeated. No reason was given why the physician's directions were not obeyed except the track was rough and the jolting would have increased the flow of blood. There were other physicians in

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near-by towns, but none of them were called. There were also automobiles at hand and in the city, but none of them were called into use to take the man to the city, and the excuse given was that the roads were rough and the jostling would increase the flow of blood. The superintendent telephoned to the general offices of the quarry company in the city, and was instructed to bring the boy to the city on a passenger train, which was due to arrive at the station three hours after the accident, but arrived one hour behind schedule. It was suggested to the superintendent that a rope be tied around the man's leg above the injury, but he said it would do no good. The blood continued to flow, and the man was removed to the company's office, where a sheet was placed over and under the injured parts, and four hours after the accident he was placed upon the hour-late passenger train and taken to the city, where he was met by automobile, surgeons and nurses and taken to a near-by hospital, and the leg bandaged. At the time he was practically without blood, though still rational. An amputation was at once performed, but in a few hours he died. *Held*, that the evidence tended to show that the quarry company was guilty of negligence in not using more diligence to procure medical and surgical treatment for the young man, and also to show that said negligence was the proximate cause of his death, and whether or not such negligence existed was a question for the jury.

4. ———: ———: ———: ———: **Basis for Rule.** Where a servant, in performing dangerous work for his master, is so badly injured as to be incapacitated to care for himself, the duty of providing medical treatment is devolved upon the master; and the rule is based upon the unexpressed humane and natural understanding existing between civilized men that wherever any one is so injured that he cannot care for himself then those who stand by and have directly or indirectly contributed to his injury owe him the duty of trying, while the emergency lasts, to alleviate his suffering or save his life, and that rule is but the application or extension of the common-law rule which requires the master to furnish his servant with a safe place in which to work and safe instrumentalities with which to perform his labor.
5. ———: ———: ———: **Proximate Cause of Injury: Instruction.** In a suit for damages for negligent failure by an employer to furnish a dangerously injured employee prompt medical assistance, an instruction should not tell the jury that if they are unable to determine whether the deceased would have died from the injury received, even though proper medical assistance had been promptly furnished him, then they should find for the defendant. Such an instruction raises a purely metaphysical speculation, since no man can

answer it with certainty. The law is that as soon as the dangerous injury occurred, while the employee was in the discharge of his work for the master, it became the master's duty, in the emergency, to use diligence to provide medical treatment for him, and if the evidence shows his negligent failure to employ reasonable efforts to do so in all reasonable probability was the proximate cause of the employee's death, the master is liable. On the other hand, the court should instruct the jury for defendant that if they believe from the evidence that the injury was the direct and proximate cause of his death, the master is not liable.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields*, Judge.

AFFIRMED.

J. E. Carroll and Watts, Gentry & Lee for appellant.

Joseph Wheless for respondent.

WOODSON, P. J.—This suit was instituted in the circuit court of Jefferson county by the plaintiff, as administrator of the estate of Fred R. Hunicke, deceased, against the defendant, to recover the sum of \$10,000 damages for the death of said Fred, caused by the alleged negligence of the defendant in failing to procure a physician or surgeon to attend and treat him upon receiving severe personal injuries while in the employ of the defendant.

The trial resulted in a verdict and judgment for the defendant, which, upon timely motions for a new trial and in arrest of judgment having been filed, were by the circuit court sustained and a new trial ordered for certain reasons assigned, which will be presently noticed. From this action of the court in ordering a new trial the defendant timely and properly appealed the cause to this court.

Counsel for the defendant insist that the petition does not state facts sufficient to constitute a cause of

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action against it; and for that reason we are required to set it out and pass upon its sufficiency.

Formal parts omitted, the petition reads:

“Plaintiff, August Hunicke, states that he is a resident of Jefferson county, Missouri, and that he is the duly appointed and qualified administrator of the estate of his son, Fred R. Hunicke, who came to his death in said county of Jefferson on the 12th day of March, 1909; and the defendant, Meramec Quarry Company, is a corporation under the laws of the State of Missouri, engaged in conducting a stone quarry at a point called Wicks, on the main line of the St. Louis, Iron Mountain & Southern Railroad Company, in said Jefferson county, Missouri, and said defendant company has an office and place of business at Wicks in said Jefferson county, Missouri.

“Plaintiff further states that his said son, Fred R. Hunicke, on and for some time prior to the 12th day of March, 1909, was in the employ of the defendant corporation at its said quarry at Wicks; that said defendant company at that time maintained a certain track of railroad extending from the said main line of the said Iron Mountain Railroad Company into the private yards of the said quarry company, to its plant; that on said 12th day of March, 1909, while certain cars loaded with coal for the use of the defendant company were being transported over said spur track into the private yard of the defendant company, plaintiff’s said son, Fred R. Hunicke, was struck by said moving cars, and was severely crushed and injured by the same; and plaintiff states that the wheels of said moving cars ran over his said son, and broke and crushed the bones of his right leg several inches below his thigh, and lacerated the flesh, muscles and veins of his leg, and tore a large hole in the same, through which the bones of his leg protruded, so that blood flowed from said wound in large quantities; that said wounds were of such a nature, and the flow of blood therefrom

was in such quantities, that it created a sudden emergency that required the immediate attention and service of a physician or surgeon to treat and dress said wound and stop said flow of blood; said injuries being of such a nature as to require the amputation of the deceased's said right leg.

“And plaintiff avers that owing to the said serious injury so occasioned to his said son, and the sudden emergency thus created, it became and was the duty of the defendant company to render prompt and immediate assistance and surgical aid to his said son, in order to stop the flow of blood from his body and to save his life; and plaintiff avers that if prompt and proper surgical attention had been furnished his son, and the flow of blood from his wounds had been stopped within a reasonable time, his said son's life would have been saved, with no other serious consequences than the loss of his said right leg; and plaintiff avers that the said defendant company, recognizing the duty thus imposed upon it by the said sudden emergency, did assume and undertake to render surgical assistance and first aid to his said son, but in so doing acted in such a careless and negligent manner that his said son was allowed to bleed to death before any effective assistance was furnished him.

“Plaintiff avers that the point at which his said son was injured in the yards of the defendant company was within a few hundred feet from the main tracks of the said Iron Mountain Railroad, and distant but two miles from the town of Kimswick, in said Jefferson county, and was only about fifteen miles from the Broadway Station of the said railroad in the city of St. Louis, and that just beyond Kimswick and within a few miles of the scene of said injuries, there are several other towns at which competent and skillful surgeons reside and could have readily been obtained, and to any of which stations on said railroad plaintiff's said son could have readily and speedily been trans-

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ported and taken to any of such surgeons or physicians, and said defendant company had then and there in its said yard a number of hand cars used in its work of hauling stone, and which were adapted to run on the tracks of said railroad, upon which plaintiff's said son could have been easily taken to any of the neighboring towns or to St. Louis; and plaintiff avers that his said son was injured a few minutes after nine o'clock in the morning of said day, and at a time when a local passenger train, southbound, was standing on the said Iron Mountain tracks very close to the point where his said son was injured; and the said defendant company could readily have detained it, or have intercepted it before it reached said town of Kimswick, so that plaintiff's said son could have been transported on said train to a suitable place where the surgical attention could have been given him.

"Plaintiff further avers that the superintendent of the defendant company in charge of said quarry was present at the time his said son was injured; that said superintendent thereupon directed other servants of the defendant company to carry plaintiff's said son to the office of the company adjacent to the said main line of the Iron Mountain Railroad, and accompanied him to said office, and caused him to be laid on a cot which was there provided for him; that said superintendent examined said injuries, and saw the great amount of blood that was being lost through said wounds, and realized their serious nature and the urgent necessity of securing immediate surgical attention, and his duty in such emergency to furnish the same; that in consequence thereof he immediately telephoned to a competent surgeon in the said town of Kimswick, and asked him to come at once to Wicks, distant two miles from Kimswick, but that said surgeon replied that he was then busy and could not come, but suggested to said superintendent that he send the injured man to him at Kimswick, which said superin-

tendent carelessly and negligently failed and refused to do, as he very easily could have done. And plaintiff avers that instead of making use of means readily at hand to tie up and bind the leg of the plaintiff's son, and stop the loss of blood, by tying a rope or other bandage around said leg above said wounds, said superintendent of said company carelessly and negligently failed to bind said leg tightly and stop the flow of blood, but only wrapped a sheet loosely around the said injured leg in such a way that the blood continued to flow from said wounds; and instead of calling surgical assistance from some other town, or of transporting plaintiff's said son to such a place where surgical attention could be had, said superintendent carelessly and negligently allowed plaintiff's said son to lie in the office of said company for the space of about four hours, without attention, during all which time he continued to lose large quantities of blood from his said wounds; and carelessly and negligently allowed his said son to remain there without attention until the regular train of the said Iron Mountain Railroad, going to St. Louis, arrived at Wicks nearly one hour later than its usual time; that upon the arrival of said train, defendant's said superintendent placed plaintiff's said son on said train, and telephoned to the defendant's office in the city of St. Louis, to convey plaintiff's said son to the hospital; and the officers of the defendant company in St. Louis called an ambulance, and upon the arrival of said train at said Broadway Station, conveyed plaintiff's said son to the Lutheran Hospital, a short distance from said Broadway Station.

"And plaintiff avers that upon the arrival of his said son in the said ambulance at the said hospital, all of the blood in his body had been allowed to escape, so that, although his said leg was immediately amputated, it was impossible to save his life, and he immediately died as the direct result of the loss of blood occasioned by the careless and negligent attention given

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him in said emergency by the officers and servants of the said defendant company. And plaintiff avers that but for the careless and negligent manner in which defendant's said servants discharged the duty which the defendant company owed and assumed towards his said son, and their carelessness and negligence in allowing him to lie several hours without adequate aid, so that he lost all the blood from his body, his life would have been saved, and he would not have died.

"And plaintiff avers that at the time of the death of his said son, Fred R. Hunicke was a young man about twenty-one years and six months of age, and was single and unmarried, and left no widow or children surviving him; and that a cause of action for the said negligence on the part of the defendant company has accrued to him, as administrator of the estate of his said deceased son, in the sum of \$10,000, for which amount he asks judgment against the defendant corporation, together with the costs of this suit."

The answer was a general denial.

The facts of the case are practically undisputed, yet there is some conflict among the opinions of expert witnesses.

The evidence for the plaintiff tended to show that the defendant was a corporation duly organized and incorporated under the laws of this State, and was engaged in the stone business, at Wicks, in Jefferson county, and in the city of St. Louis, Missouri.

That the plaintiff was the duly appointed, qualified and acting administrator of the estate of Fred Hunicke, deceased; that deceased was the lawfully begotten son of the plaintiff; that he was never married, and died intestate, leaving his father and mother and brothers and sisters as his only heirs at law.

That deceased was about twenty-two years of age at the time of his death, six feet tall and weighed about one hundred and sixty-five pounds; and that he was

hale, hardy and robust, never sick in his life, nor did he smoke or chew tobacco or drink intoxicating liquors.

That he was employed in the quarry of the defendant on March, 1909, at Wicks, the time when he sustained the injuries mentioned.

The injuries mentioned were caused by a car running over him, belonging to the St. Louis and Iron Mountain Railway Company, while moving on a spur track in the defendant's premises.

That the injuries were most grievous, his right leg being severely crushed and lacerated at a point from four to seven inches below the hip joint. The fractured bone punctured a hole about the size of a silver dollar in the fleshy part of the limb, through which great quantities of blood were freely flowing at the time assistance reached him, which was almost simultaneous with the reception of the injury.

The injury occurred about nine o'clock a. m., and Mr. Buder, the superintendent of the quarry, who was present, at once had Hunicke taken to and placed upon a cot in the company's office building near by, and telephoned to Dr. Kirk, a physician at Kimswick, some two miles distant, requesting him to come at once and treat the injured party. The doctor having been previously called to attend another person who was dangerously ill, so notified Mr. Buder, and stated that he could not come, and that about one hour later he again called the doctor, who replied that he was still engaged, and could not leave the dying patient. Dr. Kirk requested Mr. Buder to take the injured party to Kimswick, which could have been done on a hand-car, then present. Mr. Buder, for reasons not made perfectly clear, declined to take Hunicke to Kimswick as suggested by the doctor.

In the meantime one George Dotzler, who was present, and also an employee of the defendant company, proposed to tie a rope tightly around the leg of the injured party above the injury, so as to stop the

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flow of blood; but the superintendent, Buder, told him not to so do, as it would do no good. At a time not made definite by the evidence, Buder notified the manager of the company at St. Louis of the injury, who instructed him to place Hunicke on the next train bound for St. Louis—thirteen miles away—and made arrangements for automobiles, doctors, nurses, etc., to carry him to the hospital in that city for treatment.

The witness George Dotzler, previously mentioned, and who wanted to tie the rope around the injured leg, had served for several years in the United States Cavalry, and had received instructions, as all such do, in rendering the first or emergency aid to injured persons from gun shots or other causes; but the record nowhere shows that Buder had any knowledge of that fact when he told Dotzler that it would do no good to tie a rope around the injured limb.

Mrs. Buder, wife of the superintendent, a good woman, as evidently she was, with a heart full of the milk of human kindness, as soon as she heard of the sad affair, immediately went to the office where Hunicke was resting, and administered unto him all the aid she possessed, trying to alleviate his suffering and make him comfortable, and in order to stanch the flow of blood, she placed a sheet under and over the injured parts of the limb, and never left him from that time until some four to seven hours afterwards, when he was placed in the care of physicians and nurses in the hospital at the city of St. Louis, save and except for a few moments before starting to the city, she left him to change the blood-stained dress she wore while administering unto his necessities.

The evidence also tended to show that there were other physicians in the near-by towns and villages, but none of them were called; that he could have been taken to the city of St. Louis, thirteen miles away, in an automobile in a comparatively short time as compared

to the time consumed in waiting for the train and carrying him thither.

Nothing further was done for the injured party until about one o'clock p. m. of that day, when he was put upon a train, sent to the hospital and his leg amputated. During the entire time from the instant of the injury, down to the time the bandage was placed upon his leg in the hospital, four or five hours later, the blood never ceased to flow from this ugly, gaping wound, and when the amputation took place his body was practically bloodless and lifeless, though he was still rational. A few hours thereafter he breathed his last.

The operating surgeons were Drs. Nietert and Konzelman. The latter first attended the young man and testified that the injury was between the middle and upper third of the femur, and the flesh and bone were crushed and lacerated. That he at once administered an anaesthetic and put a rubber band above the injury to stop the flow of what blood was left. He testified that "his loss of blood was to such an extent that there wasn't anything to do for the boy," and that if a bandage had been applied shortly after the accident "the chances are that he would have saved a great deal of blood." That "there is no question about that," but, "I am unable to say whether it would have stopped the flow of blood entirely." "That there was a reasonable probability of stopping the flow entirely by putting on a tight bandage, and probably if there was a tight bandage of stopping the flow of blood." "If a bandage had been promptly applied it would in reasonable probability have stopped the flow of blood, and naturally increased his chances of recovering from the accident." "A towel or rope or leather strap is frequently used in such emergencies to stop the flow of blood."

Dr. Konzelman testified substantially to the same effect.

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That almost immediately after the accident occurred Mr. Buder telephoned to his St. Louis office and reported the injury and the serious character thereof. That thereupon the manager directed Buder to bring the injured party to the city of St. Louis and place him in a hospital, and that he engaged an ambulance to meet the train to carry him to the hospital and employed Dr. Nietert to attend the young man upon his arrival in the city. That the St. Louis manager had an automobile and rode in it to the station to meet the parties, but did not go or offer to send the automobile to Wicks, thirteen miles away, to bring the injured party to the city, which would have taken a comparatively short time.

The evidence of the defendant tended to contradict that of the plaintiff, that the injuries sustained by Hunicke were so serious and extensive in character that he would have died in spite of prompt and the best efforts of the most skilled physicians; that his death was caused solely from the injuries received by him and not because of any negligence on the part of the defendant or any of its agents or servants.

That the condition of the injuries was such that it would have been impossible to have safely carried Hunicke on a hand-car or automobile to Kimswick or from Wicks to St. Louis upon either of those carriages; that the roughness of the roads and jar and motion of the body incident to such means of travel, would have kept the wound open and caused the blood to flow more freely than if lying still on a cot in the office of the company at Kimswick or on the train bound for St. Louis.

In other words, the defendant's evidence tended to show that it was in no manner guilty of any negligence in the case, while that for the plaintiff tended to show the contrary.

Thereupon counsel for the plaintiff requested and the court over the objections of defendant, instructed the jury as follows:

“1. The court instructs the jury that if you find and believe from the evidence, that on the 12th day of March, 1909, Fred R. Hunicke was in the employ of the defendant Meramec Quarry Company, at a stone quarry owned or operated by it in Jefferson county; and that while so employed said Fred was injured at said quarry by his leg being crushed below the thigh, and that said injury was of so serious a character as to render him unable to help himself, and as to endanger his life from loss of blood through his said wounds unless it were promptly checked; and that an emergency was thus created which demanded prompt or immediate aid and surgical attention so as to prevent his bleeding to death; then the court instructs you, that it became the duty of the defendant corporation, through its officers or employees present at the place of accident, to exercise ordinary care in rendering to the injured boy such aid and assistance and to furnish such surgical treatment, in such emergency, as was reasonably possible under all the circumstances surrounding the parties, with a view to stopping the loss of blood and saving the life of the boy, if you find that it was reasonably possible to render any such attention:

“And if you further find and believe from the evidence that if such emergency aid and surgical treatment had been furnished within a reasonable time, it would with reasonable certainty have stopped the flow of blood and prevented the boy's dying from loss of blood (if you find he did die from loss of blood) or would have saved his life; and that the defendant corporation carelessly and negligently failed or unreasonably delayed to exercise such ordinary care in rendering such assistance, if you find that it could have rendered it as above explained; and that the injured boy died as a natural and direct consequence of such

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failure and negligence (if you so find), then the defendant corporation is liable in damages for such death.

“And if you further find from evidence that the plaintiff is the administrator of his said deceased son, and that said Fred at the time of his death was over twenty-one years old and unmarried and left no children, then your verdict should be for the plaintiff in a sum not to exceed \$10,000.

“2. The court instructs the jury that if you find and believe from the evidence, that on the 12th day of March, 1909, Fred R. Hunicke was in the employ of the defendant Meramec Quarry Company, at a stone quarry owned or operated by it in Jefferson county; and that while so employed said Fred was injured at said quarry by his leg being crushed below the thigh, and that said injury was of so serious a character as to render him unable to help himself, and as to endanger his life from loss of blood through his wounds unless it were promptly checked; and that an emergency was thus created which demanded prompt or immediate aid and surgical attention so as to prevent his bleeding to death;

“And if you further find and believe from the evidence that the defendant corporation, by and through its officers or employees then present, assumed and undertook to render emergency assistance and treatment to said injured boy, by removing him to its office and treating his wounds or by calling a surgeon and sending the boy to the hospital, as mentioned in the evidence;

“Then the court instructs you, that it became the duty of the said defendant corporation, through its said officers or servants to act promptly and to use ordinary care and diligence in binding or treating his said wounds to stop the flow of blood, and to place the wounded boy in the charge of a competent surgeon, if it so undertook to do, within a reasonable time in view

of the nature of his injuries and the circumstances of the case, so as if possible to save his life.

“And if you further find and believe from the evidence, that the defendant corporation, by the use of such care and diligence in furnishing emergency treatment to said injured boy and in placing him in charge of a surgeon within a reasonable time after his injury, could with reasonable certainty have stopped the loss of blood and saved his life, but that it carelessly failed and neglected to use such ordinary care or did those things which it undertook to do in a careless and negligent manner, or unnecessarily and beyond a reasonable time delayed in performing the services which it assumed to render, and that such carelessness and negligence of delay, if any such you find, were the natural and proximate cause of the death of the said Fred R. Hunicke, then the defendant corporation is liable in damages for his death;

“And if you further find from the evidence that plaintiff is the administrator of his said deceased son, and that said Fred at the time of his death was over twenty-one years of age, and unmarried, and left no children, then your verdict should be for the plaintiff and against the defendant corporation, in a sum not exceeding \$10,000.”

And the court on behalf of the defendant then instructed the jury over the objections and exceptions of plaintiff, as follows:

“1. The court instructs the jury that this suit is not based on any liability of defendant for injuring the deceased Fred Hunicke, by striking or running over him with a car, and therefore plaintiff is not entitled to any verdict at your hands on account of the inflicting of injury upon the deceased Fred Hunicke on the occasion in question.

“2. The court instructs the jury that if you believe and find from the evidence in this case that after the deceased Fred Hunicke was injured the defendant

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exercised ordinary care to secure for him surgical and medical treatment at the hands of competent physicians and surgeons, then the defendant fully discharged its duty towards said Fred Hunicke and is not liable to the plaintiff in this case.

"3. By the term 'ordinary care' as mentioned in these instructions is meant such care as a reasonably prudent person would exercise under the same or similar circumstances.

"4. The court instructs the jury that if after considering all the evidence in the case you are unable to determine whether the deceased Fred R. Hunicke would have died from the injury he received on the defendant's premises, even if proper medical assistance had been promptly rendered him, then your verdict must be for the defendant.

"6. The court instructs the jury that if after considering all the evidence in the case you are unable to determine whether the deceased Fred R. Hunicke would have died from the injury he received on the defendant's premises, even if proper medical assistance had been promptly rendered him, then your verdict must be for the defendant."

Counsel for the defendant asked two other instructions, which in effect were in the nature of demurrers to the evidence. Both of these were refused, and the defendant duly saved its exceptions.

I. The first error counsel for defendant complain of is stated in this language:

"The court erred in sustaining plaintiff's motion for a new trial, because the petition does not state	
Injury to Employee:	facts sufficient to constitute a cause of
Medical Treatment:	action against the defendant, and there-
Emergency:	fore could not have supported a verdict
Liability of Master.	for the plaintiff, if one had been rendered.

Hence the verdict for the defendant was the only verdict that could properly have been rendered in the case, and should not have been disturbed."

In support of this contention we are cited to the following authorities: *Davis v. Forbes*, 171 Mass. 548, 47 L. R. A. 170; *Railroad v. Hennegan*, 33 Tex. Civ. App. 314; *Gray v. Lumpkin & Thomas*, 159 S. W. 880; *Pittsburgh, etc., R. R. Co. v. Sullivan*, 141 Ind. 83, 50 Am. St. Rep. 313; *Spelman v. Gold Coin Mining & Milling Co.*, 26 Mont. 76, 91 Am. St. Rep. 402; *Voorhees v. N. Y. Central & H. R. R. Co.*, 114 N. Y. Supp. 242, 198 N. Y. 558; *Vorass v. Rosenberry*, 85 Ill. App. 623; *Sweet Water Mfg. Co. v. Glover*, 29 Ga. 399; *Denver & R. G. R. Co. v. Iles*, 25 Colo. 19; *King v. Interstate Consolidated Street Railway Co.*, 70 L. R. A. 924.

The principal legal proposition involved in this case is somewhat novel, and this is the first time it has been directly presented to this court for consideration. For this reason I deem it important that the authorities relied upon by counsel for the respective parties as sustaining their respective positions, should be reviewed somewhat extensively.

However, before undertaking to discuss this question, it might not be out of place to state the well known and universally established rule that, "where a physician or surgeon renders services to one at the mere request of a third person on whom there rests no obligation to provide such service, the law will not imply a contract to pay on such mere request." The law on this question is succinctly and accurately stated in 22 Am. & Eng. Ency. Law, 790, 791, as follows: "When a person requests a physician to perform services for a patient, the law does not raise an implied promise to pay the reasonable value of the service so rendered, unless the relation of the person making the request to the patient is such as raises the legal obligation on his

part to call in a physician and pay for the services.” [Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553, and cases cited.]

Orderly conduct requires that we consider, first the authorities cited by the defendant, the appellant here; and thereafter those of the plaintiff, the respondent here.

Before taking up the cases of the defendant in detail it may be well to state generally none of them “is on all-fours” with the case at bar, for the reason that the question of “emergency” so strongly urged in this case, was not presented or considered in any of the cases cited by counsel for defendant.

The case of *Davis v. Forbes*, 171 Mass. 548, 1. c. 553, was where a boy, whose exact age was not shown, sued his employer for personal injuries alleged to have been sustained by him through the negligence of his employer and for negligence in not furnishing him with medical attendance. He was injured by falling from or by having been thrown from a horse he was training on a race-course. Neither the character nor the extent of the injuries was shown, and therefore the question of emergency was not involved. The court held, first, that he could not recover for the injuries sustained, because he assumed the risk, etc.; and, second, without discussing the question, that: “An employer is under no legal obligation to furnish his injured employees with medical attendance.” In the light of the facts of that case, the opinion is of but little weight in this case.

In the case of *Railroad v. Hennegan*, 33 Tex. Civ. App. 314, the company had agreed to furnish the employee medical service, but having failed to so do, the latter sued in tort for the injuries he claimed were negligently inflicted upon him by that failure. In that case the court simply held that the plaintiff’s cause of action was for a breach of the contract, and not in tort

for negligence. Consequently that case has no application whatever to the case at bar.

The case of *Gray v. Lumpkin*, 159 S. W. 880, also grew out of an alleged contract whereby the employer agreed to furnish the employee medical service, which fact renders it inapplicable as an authority in this case.

In the case of *Spelman v. Gold Coin Co.*, 26 Mont. 76, the plaintiff sued the company to recover the value of medical services rendered at the request of the superintendent to one of its injured employees. The court held that the superintendent, *as such*, had no authority to employ a physician in such a case, in the absence of negligence on the part of the company. There being no claim of negligence the court added: "Query: Whether in a case where an employee is injured through the actionable negligence of the company, the general manager of a mining company can bind his principal by such a contract?"

To the same effect is the case of *Voorhees v. N. Y. Central & H. R. R. Co.*, 114 N. Y. Supp. 242, affirmed in 198 N. Y. 558.

It will be observed that the two last cases turned upon the authority of the superintendent to employ the physician, and not the liability of the master, had the physician been employed by a duly constituted agent of the company. Quaere: If the company was in legal duty bound to furnish medical aid in such case was not the superintendent authorized to employ the physician as a matter of law?

The case of *Vorass v. Rosenberry*, 85 Ill. App. 623, was a suit brought by a physician against the father of an injured son, to recover for medical services rendered to the later, who was of age, and who was found lying unconscious in the middle of the street where he had fallen from a wagon and fractured his left thigh bone. The physician, Rosenberry, the defendant in error, was summoned to attend the son by a stranger. The son was removed to the father's house accom-

panied by the physician, who was a stranger to both the father and son. The son continued to live with his father and assisted him in his business after attaining his majority, just as he did prior to that time. The evidence showed that the father never employed the physician, and that he did not desire him to treat his son; but the son insisted upon being treated by this physician. The circuit court rendered a judgment in favor of the physician, but upon writ of error the Court of Appeals reversed the judgment and held the father not liable.

The case of *King v. Interstate Consolidated Street Ry. Co.*, 70 L. R. A. 924, involved the legal duty of the company to furnish its employees with food and shelter, etc. The court held he could not recover. This case is not in point.

The case of *Weinsberg v. Cordage Co.*, 135 Mo. App. 553, was a suit to recover a doctor bill. There the points decided, were: First, did the corporation have the charter power to employ a physician to treat an injured employee; and, second, did the president of the company, without express authority from the board of managers of the company, have the authority to employ the physician to treat the injured employee? In that case the court ruled both of those points in favor of the plaintiff. The same conclusions were announced in the case of *Freeman v. Baking Co.*, 126 Mo. App. 124. Neither of those cases involved the question of the *legal duty* of the company, in the absence of contract, to furnish medical aid to an injured employee of the company; nor was that question discussed or decided by the court.

We are also cited to two cases recently decided by the St. Louis Court of Appeals, *Ghio v. Schaper Bros. Merc. Co.*, 180 Mo. App. 686, and *Newberry v. Missouri Granite & Const. Co.*, 180 Mo. App. 672. These cases were also predicated upon contract. That is, the physicians who sued for their fees were employed by the

proper officers of the respective companies to perform the services. None of these cases are in point.

Nor is the case of *Phillips v. St. Louis & S. F. R. R. Co.*, 211 Mo. 419, in point. There the railroad company not only agreed to pay the doctor bills and hospital charges, etc., but, in advance, deducted from his and the other employees' wages so much money, estimated to be sufficient to pay all such bills.

Practically all, if not all, of the cases so far considered, were cases where various physicians or surgeons sued various defendants to recover bills for services performed by them to various injured employees of the various defendants. Some of the cases were based upon contracts, and the defenses were that either the company had no charter authority to employ a physician or surgeon in any case, or that the agent of the company, who made the contract on behalf of the company, had no authority from the company to make the same. The remainder of the cases considered, turned upon the point whether or not the agent of the company had the implied authority to employ a physician or surgeon to treat, at the expense of the company, an injured employee thereof.

The Supreme Court of Indiana, in the case of *Pittsburgh, etc., Railway Co. v. Sullivan*, 141 Ind. 83, held that the company was under no general legal obligation to employ medical service for its injured employees; and that if it did so gratuitously and the surgeon amputated a limb of an injured employee against his consent and expressed command, the company would not be liable in damages to the employee for the unlawful amputation.

In the case of *Sweet Water Mfg. Co. v. Glover*, 29 Ga. 399, the plaintiff, a physician, sued the company for surgical services rendered to one of the company's injured employees. In that case the Supreme Court of Georgia held that, in the absence of contract, the company was not liable to the plaintiff for the services so

rendered, and that the authority of the superintendent of the company, as such, did not authorize him to employ physicians to treat its employees.

In the case of *Denver & R. G. R. R. Co. v. Iles*, 25 Colo. 19. the supreme Court of Colorado held that the company, in the absence of contract, was not legally bound to furnish medical services to its injured employees; and if, therefore, it neglected or refused to summon medical aid for one injured, while acting within the scope of his employment, it could not be held liable for negligently failing to so do.

The last three cases mentioned, in effect, support the contention of counsel for the defendant, that the petition does not state facts sufficient to constitute a cause of action against it. It will be observed, however, that the question of *emergency* relied upon in this case was not involved or decided in any of those. The emergency in this case seems to be the differentiating fact between this case and those. In the light of this difference it may be said that counsel for defendant has cited no authority that is directly in point in this case.

Having with considerable care and pains considered the contention of counsel for defendant, that the petition in this case does not state facts sufficient to constitute a cause of action against it, we will now state the position counsel for plaintiff take regarding that question, and then consider the authorities cited by them in support thereof.

The position of counsel for plaintiff is stated in the following language:

“The petition states a good cause of action. An employer, although a corporation, owes a legal duty to an injured employee in the emergency caused by such injury to use reasonable care and diligence in furnishing emergency aid and surgical treatment to such injured employee; and he is liable (1) to the injured employee for failure to perform this duty or for negli-

gence in its performance; and (2) is liable to a physician or surgeon for the cost and expenses of such emergency treatment. And, 'whether the injured employee received his hurt through the negligence of the employer or not is certainly immaterial.' [135 Mo. App. 1. c. 568.]'' The authorities cited by plaintiff are as follows: Weinsberg v. St. Louis Cordage Co., 135 Mo. App. 553; Freeman v. Yonge Baking Co., 126 Mo. App. 124; Meisenbach v. Southern Cooperage Co., 45 Mo. App. 232; Powell v. Frisco Railroad, 229 Mo. 246; Brown v. M., K. & T. Railroad, 67 Mo. 122; McCarthy v. Railroad, 15 Mo. App. 385; Evans v. Marion Mining Co., 100 Mo. App. 670; Reynolds v. C., B. & Q. Railroad, 114 Mo. App. 670; Phillips v. St. L. & S. F. R. R. Co., 211 Mo. 419; Ghio v. Schaper Bros. Merc. Co., 180 Mo. App. 686; Newberry v. Mo. Granite & Const. Co., 180 Mo. App. 672; Salter v. Nebraska Tel. Co., 79 Neb. 373; Depue v. Flateau, 111 N. W. 1; Ohio & M. Ry. Co. v. Early, 28 L. R. A. 1. c. 551; Railroad v. State to use, 29 Md. 420; Glenn v. Hill, 210 Mo. 1. c. 297; Pate v. Tar Heel Steamboat Co., 148 N. C. 571; Bresnahan v. Lonsdale Co., 51 Atl. 624; Farmer v. Central Iowa Ry. Co., 67 Iowa, 136; Louisville, etc., Ry. Co. v. Smith, 121 Ind. 353; Schumaker v. Railroad, 12 L. R. A. 1. c. 258; Hill v. Winsor, 118 Mass. 251; Holmes v. McAllister, 48 L. R. A. 1. c. 398, 123 Mich. 493; Railroad v. Cappier, 66 Kan. 649, 69 L. R. A. 513, and note, 1. c. 533; Railroad v. Marrs's Admx. (Ky.), 70 L. R. A. 1. c. 293; King v. Interstate Street Ry. Co., 23 R. I. 583, 70 L. R. A. 924; The Iroquois, 118 Fed. 1. c. 1005.

While counsel have cited a great many authorities in support of their proposition, yet we do not feel called upon to review all of them in this opinion; however, we will notice such as we consider as specially applicable to the case.

† I do not understand counsel for plaintiff to make the broad claim that, in the absence of the question of *emergency*, presented in this case, it would have been

the duty of the defendant to have furnished medical or surgical treatment for the injured man, upon the occasion mentioned; but I do understand counsel to contend, and which I believe is the law, that when an employee is engaged in any dangerous business for the master, and while in the performance of his duties, as such, he is so badly injured that he is thereby rendered physically or mentally incapable of procuring medical assistance for himself, then that duty as a matter of law, is devolved upon the master, and that he must perform that duty with reasonable diligence and in a reasonable manner, through the agency of such of his employees as may be present at the time.

In other words, without trying to state the law in detail governing the master's duties in all cases of this character, that duty is put in operation whenever, under the facts and circumstances of the case, the employee is thereby so injured that he or she is incapacitated from caring for himself or herself, as the case may be.

The uncontradicted evidence in this case shows that the deceased was so badly injured that he was physically incapacitated to care for himself or to engage medical or surgical treatment; also, that the character of his injuries was such as required immediate surgical attention, for it was apparent to all present that his leg was frightfully crushed, and that his life's blood was freely flowing from his body. So obvious was this that several of those present, at the time of the accident, tried by their crude methods, to stop its flow. But the highest officer of the company present, the superintendent, thought none of their remedies were worthy of trial and told them their proposed treatment would do no good. He then telephoned to Dr. Kirk, at Kimswick, the condition of the injured man, Hunicke, and requested him to come to Wicks and treat the injured man; but the doctor being previously engaged in a serious case, could not leave it. The doctor,

however, telephoned the superintendent to bring the injured party to Kimswick, some two miles distant, and that he would there treat him.

The evidence shows that both Wicks and Kimswick were on the railroad and that a hand-car was present which could have been used in conveying Hunicke from the former to the latter place for treatment.

For some reason not made clear, the superintendent declined to take the injured man to Kimswick for treatment, but telephoned the facts of the injury to the manager of the company at St. Louis, some twelve or fourteen miles distant, who telephoned back to the superintendent to place the injured man on the next train and send him to St. Louis. This was done; and some three or four hours later, the train arrived in the city; and upon the arrival of the train, Hunicke was speedily taken to the hospital where his limb was amputated; but in the meantime practically all of the blood of his body had flowed therefrom; and he died shortly thereafter.

In the statement of the case we have set out much of the evidence tending to show the negligence of the defendant in not procuring surgical treatment for Hunicke more promptly; and that he would not have died had he received prompt treatment. That evidence tended to show that Kimswick was only two miles distant from the place of injury and that the injured man could have been taken there on a hand-car in a very *few* minutes, probably from fifteen to twenty, at the outside. Had this been done, in all probability, the flow of blood would have been stanchd several hours before it was finally stopped in the city of St. Louis.

It is true that there was some evidence which tended to show that such a trip on a hand-car would have been rough and jolting, and thereby might have aggravated the flow of the blood, but conceding that to

be true, it could not have caused more waste of blood than did the constant flow during the hours that passed while he was waiting for the train and being conveyed to the city of St. Louis thereon. And it seems to me that common sense would teach us that a trip on a hand-car to Kimswick would not have caused the blood to flow more freely than the trip on the train to St. Louis, six or seven times as far, would have done.

But be that as it may, when we consider those facts in connection with all the other facts and circumstances shown by the evidence, we have reached the conclusion that this, as well as the question of negligence in delaying the procurement of a surgeon, was for the jury, and that the evidence introduced was sufficient to make out a *prima facie* case for the plaintiff.

In other words, we are of the opinion that the evidence tended to show that the company was guilty of negligence in not using more diligence in procuring medical and surgical treatment for this party; also that it tended to show that said negligence was the proximate cause of his death.

These views, in our opinion, are fully supported by the following authorities, which we will briefly review:

In the case of *Railroad v. Cappier*, 66 Kan. 649, l. c. 650, the Supreme Court of that State, in discussing this question, said:

“While attempting to cross the railway tracks Ezelle was struck by a moving freight car pushed by an engine. A yard-master in charge of the switching operations was riding on the end of the car nearest to the deceased and gave warning by shouting to him. The warning was either too late or no heed was given to it. The engine was stopped. After the injured man was clear of the track, the yard-master signaled the engineer to move ahead, fearing, as he testified, that a passenger train then about due would come upon them. The locomotive and car went forward over a bridge,

where the general yard-master was informed of the accident and an ambulance was summoned by telephone. The yard-master then went back where the injured man was lying and found three Union Pacific switchmen binding up the wounded limbs and doing what they could to stop the flow of blood. The ambulance arrived about thirty minutes later and Ezelle was taken to a hospital, where he died a few hours afterward.

“In answer to particular questions of fact, the jury found that the accident occurred at 5:35 p. m.; that immediately one of the railway employees telephoned to police headquarters for help for the injured man; that the ambulance started at 6:05 p. m. and reached the nearest hospital with Ezelle at 6:20 p. m., where he received proper medical and surgical treatment. Judgment against the railway company was based on the following question and answer:

“‘Q. Did not defendant’s employees bind up Ezell’s wounds and try to stop the flow of blood as soon as they could after the accident happened? A. No.’

“The lack of diligence in the respect stated was intended no doubt, to apply to the yard-master, engineer and fireman in charge of the car and engine.

“These facts bring us to a consideration of the legal duty of these employees toward the injured man after his condition became known. Counsel for defendant in error quotes the language found in Beach on Contributory Negligence (3 Ed.), section 215, as follows:

“‘Under certain circumstances, the railroad may owe a duty to a trespasser after the injury. When a trespasser has been run down, it is the plain duty of the railway company to render whatever service is possible to mitigate the severity of the injury. The train that has occasioned the harm must be stopped, and the injured person looked after; and, when it seems nec-

essary, removed to a place of safety, and carefully nursed, until other relief can be brought to the disabled person.'

"The principal authority cited in support of this doctrine is Northern Central Railway Co. v. State, use of Price et al., 29 Md. 420, 96 Am. Dec. 545. The court in that case first held that there was evidence enough to justify the jury in finding that the operatives of the train were negligent in running it too fast over a road crossing without sounding the whistle, and that the number of brakemen was insufficient to check its speed. Such negligence was held sufficient to uphold the verdict and would seem to be all that was necessary to be said. The court, however, proceeded to state that, from whatever cause the collision occurred, it was the duty of the servants of the company, when the man was found on the pilot of the engine in a helpless and insensible condition, to remove him, and to do it with proper regard to his safety and the laws of humanity. In that case the injured person was taken in charge by the servants of the railway company and, being apparently dead, without notice to his family, or sending for a physician to ascertain his condition, he was moved to defendant's warehouse, laid on a plank and locked up for the night. The next morning, when the warehouse was opened, it was found that during the night the man had revived from his stunned condition and moved some paces from the spot where he had been laid, and was found in a stooping posture, dead but still warm, having died from hemorrhage of the arteries of one leg, which was crushed at and above the knee. It had been proposed to place him in the defendant's station-house, which was a comfortable building, but the telegraph operator objected, and directed him to be taken into the warehouse, a place used for the deposit of old barrels and other rubbish."

While the court decided that case against the plaintiff because he was a trespasser and not an employee,

yet it clearly recognized the doctrine contended for by counsel for the plaintiff in this case.

And in the case of *Depue v. Fleteau*, 111 N. W. l. c. 2, the Supreme Court of Minnesota, in discussing this question, said:

“The facts of this case bring it within the more comprehensive principle that whenever a person is placed in such a position with regard to another that it is obvious that, if he does not use due care in his own conduct, he will cause injury to that person, the duty at once arises to exercise care commensurate with the situation in which he thus finds himself, and with which he is confronted, to avoid such danger; and a negligent failure to perform the duty renders him liable for the consequences of his neglect. This principle applies to varied situations arising from non-contract relations. It protects the trespasser from wanton or wilful injury. It extends to the licensee, and requires the exercise of reasonable care to avoid an unnecessary injury to him. It imposes upon the owner of premises, which he expressly or impliedly invites persons to visit, whether for the transaction of business or otherwise, the obligation to keep the same in reasonably safe condition for use, though it does not embrace those sentimental or social duties often prompting human action. [21 Am. & Eng. Ency. Law, 471; Barrows on Negligence, 4.] Those entering the premises of another by invitation are entitled to a higher degree of care than those who are present by mere sufferance. [Barrows on Negligence, 304.] The rule stated is supported by a long list of authorities, both in England and this country, and is expressed in the familiar maxim, ‘*Sic utere tuo*,’ etc. They will be found collected in the works above cited, and also in 2 Thompson on Negligence, 1702. It is thus stated in *Heaven v. Pender*, L. R. 11 Q. B. D. l. c. 509: ‘The proposition which these recognized cases suggest, and which is, therefore, to be deduced from them, is that, whenever

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one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.' It applies with greater strictness to conduct towards persons under disability, and imposes the obligation as a matter of law, not mere sentiment, at least to refrain from any affirmative action that might result in injury to them. A valuable note to *Railway Co. v. Cappier*, 69 L. R. A. 513, discusses at length the character of the duty and obligation of those coming into relation with sick and disabled persons, and numerous analogous cases are collected and analyzed.

"In the case at bar defendants were under no contract obligation to minister to plaintiff in his distress; but humanity demanded that they do so, if they understood and appreciated his condition. And, though those acts which humanity demands are not always legal obligations, the rule to which we have adverted applied to the relation existing between these parties on this occasion and protected plaintiff from acts at their hands that would expose him to personal harm. He was not a trespasser upon their premises, but on the contrary, was there by the express invitation of Flateau, Sr. He was taken suddenly ill while their guest, and the law, as well as humanity, required that he be not exposed in his helpless condition to the merciless elements. The case, in its substantial facts, is not unlike that of *Railway Co. v. Marrs*, 27 Ky. Law Rep. 388, 70 L. R. A. 291. In that case it appears that one Marrs was found asleep in the yards of the railway company in an intoxicated condition. The yard employees discovered him, aroused him from his stupor, and ordered him off the tracks. They knew that he was intoxicated, and that he had left a train

recently arrived at the station, and he appeared to them dazed and lost. About forty minutes later, while the yard employees were engaged in switching, they ran over him and killed him. He had again fallen asleep on one of the tracks. The court held the railway company liable; that, under the circumstances disclosed, it was the duty of the yard employees to see that Marrs was safely out of the yards, or, in default of that, to exercise ordinary care to avoid injuring him; and that it was reasonable to require them to anticipate his probable continued presence in the yards. The case at bar is much stronger, for here plaintiff was not intoxicated, nor a trespasser, but, on the contrary, was in defendants' house as their guest, and was there taken suddenly ill in their presence, and, if his physical condition was known and appreciated, they must have known that to compel him to leave their home unattended would expose him to serious danger.

"We understand from the record that the learned trial court held in harmony with the view of the law here expressed, but dismissed the action for the reason, as stated in the memorandum denying a new trial, that there was no evidence that either of the defendants knew, or in the exercise of ordinary care should have known, plaintiff's physical condition, or that allowing him to proceed on his journey would expose him to danger. Of course, to make the act of defendants a violation of their duty in the premises, it should appear that they knew and appreciated his serious condition. The evidence on this feature of the case is not so clear as might be desired, but a majority of the court are of the opinion that it is sufficient to charge both defendants with knowledge of plaintiff's condition—at least, that the question should have been submitted to the jury. Defendant Flateau, Sr., testified that he was in the room at all times while plaintiff was in the house and observed his demeanor, and, though he denied that plaintiff fell to the floor in a

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faint or otherwise, yet the fact that plaintiff was seriously ill cannot be questioned. Flateau, Jr., conducted him to his cutter, assisted him in, observed that he was incapable of holding the reins to guide his team, and for that reason threw them over his shoulders. If defendants knew and appreciated his condition, their act in sending him out to make his way to Madelia the best he could was wrongful and rendered them liable in damages. We do not wish to be understood as holding that defendants were under absolute duty to entertain plaintiff during the night. Whether they could conveniently do so does not appear. What they should or could have done in the premises can only be determined from a full view of the evidence disclosing their situation, and their facilities for communicating his condition to his friends, or near neighbors, if any there were. All these facts will enable the jury to determine whether, within the rules of negligence applicable to the case, defendants neglected any duty they owed plaintiff."

In the case of the Ohio & Mississippi Railroad Co. v. Early, 28 L. R. A. 546, l. c. 551, the Supreme Court of Indiana said:

"We do not think this evidence is sufficient to support the verdict. While a railroad company is under no legal obligation to furnish an employee, who may receive injuries while engaged in the service of the company, with medical or surgical assistance, yet where a day laborer or employee has, by unforeseen accident to him while engaged in the line of his duty as such employee, been rendered helpless, the dictates of humanity, duty, and fair dealing would seem to demand that it should furnish medical assistance. Of course, this duty could not rest upon the master in ordinary cases, in the absence of a contract to do so, but should rest upon him only in extraordinary cases, where immediate medical or surgical assistance is imperatively required to save life or avoid further serious

bodily injury. This duty on the railroad company only arises out of strict necessity and urgent exigency, where immediate attention thereto is demanded in order to save life or prevent great injury. The duty arises with the emergency, and with it expires. [Terre Haute & I. R. R. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752, and authorities there cited.]”

And in discussing the same question, the Supreme Court of Nebraska, in the case of Salter v. Nebraska Telephone Co., 79 Neb. 373, l. c. 376, used this language:

“It will be unnecessary, as we view the case, to pass upon all the errors assigned by the appellant. While the rule is not uniform there are many cases holding that, where a company is engaged in a business dangerous to its employees, in case of an accident of such serious character that the injured employee stands in need of immediate medical or surgical attendance, the conductor of a train, or the highest officer of the company present at the time, has, from the necessities of the case, authority to represent the company and to bind it by the employment of a surgeon for such immediate medical or surgical services and care as are required. In support of this rule the court in Terre Haute & I. R. R. Co. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752, said: ‘An employer does not stand to his servants as a stranger, he owes them a duty. The cases all agree that some duty is owing from the master to the servant, but no case that we have been able to find defines the limits of this duty. Granting the existence of this general duty, and no one will deny that such duty does exist, the inquiry is as to its character and extent. Suppose the axle of a car to break because of a defect, and a brakeman’s leg to be mangled by the derailment consequent upon breaking of the axle, and that he is in imminent danger of bleeding to death unless surgical aid is summoned at once, and suppose the accident to occur at a

point where there is no station and when no officer superior to the conductor is present, would not the conductor have authority to call a surgeon? Is there not a duty to the mangled man that some one must discharge? And if there be such a duty, who owes it, the employer or a stranger? Humanity and justice unite in affirming that some one owes him this duty, since to assert the contrary is to affirm that upon no one rests the duty of calling aid that may save life. If we concede the existence of this general duty, then the further search is for the one who in justice owes the duty, and surely, where the question comes between the employer and a stranger, the just rule must be that it rests upon the former.'

"In *Marquette & O. R. R. Co. v. Taft*, 28 Mich. 289, the yard-master of the defendant company employed a physician to amputate a leg and bind up the wounds and bruises of an employee injured in the service of the company. The employment by the yard-master was afterwards ratified by the general superintendent. The company defended upon the ground that it was not shown that either the yard-master or the general superintendent acted within the scope of their authority in employing the surgeon. Judgment went in favor of the plaintiff in the trial court, and this judgment was affirmed by the Supreme Court, Justices GROOVES and CAMPBELL voting for a reversal, COOLEY and CHRISTIANCY voting for an affirmance. Judges COOLEY and CHRISTIANCY appeared to have based their decision more upon the ground of the ratification of the employment by the general superintendent, than upon the authority of the yard-master to make a contract binding the company in the first instance.

"In *Toledo, St. L. & K. C. R. R. Co. v. Mylott*, 6 Ind. App. 438, a brakeman on the appellant's road met with an accident by which his skull was crushed. The

conductor requested the appellee to board and care for the injured man in every way necessary, stating that the company would pay for the same. The conductor was the highest officer of the company then present. After discussing the right of a general officer to bind the company by such employment, the court proceeded to discuss the right of the conductor to do so. We quote from the opinion: 'It being established that the general officers of the company would have the power under such circumstances to bind the company for the necessary board, care, and attention furnished an employee injured while in the performance of his duty, it follows, under the authorities, that the conductor also has such authority under certain circumstances. That the conductor has no such general authority in ordinary cases is conceded, but it is clear that he has such authority in the case of an emergency where an accident occurs remote from the general offices, when he is the highest officer of the company present, and when immediate action is required in order to preserve and protect the life of the injured man. In the face of this emergency, requiring immediate action to preserve human life, the duty devolves upon the company to act, and the conductor stands in the place of the company, clothed with such powers as may be necessary to meet the exigencies of the occasion.' The Supreme Court of Indiana, so far as our examination of the authorities has extended, has gone further than any other in adopting the rule that a subordinate officer has authority to bind the company by the employment of physicians and surgeons in case of an emergency, and where no higher officer of the company is present at the time, and these decisions are all to the effect that such employment binds the company only for the first or emergency service. There are numerous cases from other States holding that, where such services are obtained, and where there is direct or inferential evidence of a ratification by some general

officer, then the company is bound for all services so rendered.

“In *Toledo, W. & W. R. R. Co. v. Rodrigues*, 47 Ill. 188, the station agent of the company employed the appellant to nurse and take care of one Johnson, an injured employee of the company. He wrote to the general superintendent, making a full statement of all that had been done. The fourth paragraph of the syllabus is in the following words: ‘Where an employee of a railroad company has received injury, while in the discharge of his duty, and the station agent, in his capacity as such, assumes certain liabilities in his behalf, for nurse and medical attendance, and writes a letter to the general superintendent, stating the facts, it is presumed that the general superintendent received such notice, and in the absence of any instructions to the contrary, consented, on the part of the railroad company, to assume the liabilities of the station agent for all reasonable charges in this behalf.’ *Toledo, W. & W. R. R. Co. v. Prince*, 50 Ill. 26; *Indianapolis & St. L. R. Co. v. Morris*, 67 Ill. 295, and *Cairo & St. L. R. Co. v. Mahoney*, 82 Ill. 73, are to the same effect, but, as will be seen, these are based on the ratification by a general officer of the company of employment made by one without general authority to do so. On the whole, we are inclined to adopt the rule that a general officer of the company has power to make such a contract as is here sued on without showing that he had special authority to do so, and, if an emergency demanding immediate action exists, then the highest officer then present, whether he be conductor of a train, the station agent of the company or the foreman in charge of a gang of workmen, may bind the company for such medical and surgical attendance as the exigencies of the case may immediately demand. We recognize that this rule is one required by an emergency rather than one based on any general legal principle, and that the authority of the officer with limited pow-

ers, can extend no further than the emergency demands. As said in *Holmes v. McAllister*, 123 Mich. 493: 'Authority to act is implied from the necessity of the case. . . . Neither the authorities nor reason carry the rule beyond the emergency. Such employment does not make the employer liable for the services rendered by the physician to the employee after the emergency has passed. If the physician desires to hold the employer responsible for subsequent services, he must make a special contract with him.'

"It is urged by appellee that the emergency in this case continued during the time that Crumb was in the hospital, and this was probably the theory upon which the district court directed a verdict for the plaintiffs for the full amount of their claim. *Toledo, St. L. & K. C. R. R. Co. v. Mylott*, supra, and *Williams v. Griffin Wheel Co.*, 84 Minn. 279, are cited in support of this position. A careful reading of the opinion in the Mylott case will disclose that the only question considered by the court was the right of the plaintiff to recover at all, and that the question of the amount of the recovery was not involved. In the concurring opinion of DAVIS, J., it is said: 'No question is raised as to the extent or amount of the recovery. The only question presented for our consideration is whether appellee was entitled to recover anything. The court does not hold that appellee was entitled to recover for board of others, or for the continued care and nursing of the brakeman beyond the emergency then existing.' We do not attempt to define what are primary or emergency services, and *Williams v. Griffin Wheel Co.*, supra, does not assist us in attempting to determine the question, as the facts of that case are dissimilar from this case, so far as disclosed in the opinion, and apparently are not fully stated. We believe, however, that emergency services, unless expressly limited at the time of procuring them, ought to extend to a sufficient time for the party em-

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ployed to communicate with the company, and, if it declines to be further responsible, for notice to the proper poor authorities, if the injured party is entitled to public care.

“For the reason that the law will not impose upon the defendant company the duty of caring for one of their injured employees except for emergency treatment, and for the reason that the court refused evidence going to show that the company expressly disclaimed liability for further treatment, we recommend a reversal of the judgment.”

It will be observed that some of the cases reviewed go so far as to even hold that a trespasser may, under such facts and circumstances, recover for such negligence, but we will express no opinion regarding that matter, for the reason that Hunicke was unquestionably an employee of the defendant.

There are many other cases in this and other States, which pass upon various phases of this case; but we have been cited to no others that deal with all of the elements of this case. However, in my opinion those considered are sound upon principle and based upon reason and humanity, the essence of all law.

In my opinion there is no possibility of doubt but what the law is that, whenever one person employs another to perform dangerous work, and while performing that work he is so badly injured as to incapacitate him from caring for himself, then the duty of providing medical treatment for him is devolved upon the employer; and that duty, in my opinion, grows out of the fact that when we get down to the real facts in all such cases, there is an unexpressed humane and natural understanding existing between them to the effect that whenever any one in such a case is so injured that he cannot care for himself, then the employer will furnish him medical or surgical treatment as the case may be.

This is common knowledge. There is not an industrial institution in this country, great or small, where that practice is not being carried on to-day; and that has been the custom and usage among men from the dawn of civilization down to the present day, and will continue to be practiced in the future, just so long as the human heart beats in sympathy for the unfortunate, and desires to aid suffering humanity. The same principle underlies all other avocations of life. Even armies while engaged in actual warfare observe and obey this rule when possible. The soldier who refuses to render surgical or medical aid to the victim of his own sword, is eschewed by all decent men; while upon the other hand, all who administer to the wants and necessities of the sick and wounded, are considered as God's noblemen and as princes among men. So universally true and deep-seated is this humane feeling among men, and so universally recognized and practiced among them, that it has become a world-wide rule of moral conduct among men, brothers, friends and foes; and it says to one and all, You must exercise all reasonable efforts and means at hand to alleviate the pain and suffering and save the lives and limbs of those who have been stricken in your presence. For the violation of this rule of moral conduct there is no penalty attached save the condemnation of God and the scorn of all good men and women.

But seeing the wisdom, goodness and justice of this moral law, the law of the land laid its strong hand upon it, the same as it did upon many other good and useful customs of England, and breathed into it a living rule of legal conduct among men. It says unto all who employ labor that, because of this universally practiced custom of men to furnish medical and surgical aid for those who are stricken in their presence, you must furnish the employee with such services when he is so badly injured that he is incapacitated from caring for himself.

This is but the application or extension of the common-law rule which requires the master to furnish his servant with a safe place in which to work, and safe instrumentalities with which to perform that labor.

That law grew out of the old customs and usages of the English people, of furnishing their servants with a safe place in which to work and safe instrumentalities with which to labor. So universally true was that custom that the law read into all contracts of labor an implied promise on the part of the master to furnish those safeguards to his servants. There is no statutory or written law upon the subject. It is simply what is called the unwritten or common law of England, which has been adopted by statutes in this and many other States of the Union.

So in like manner into the universal custom of employers furnishing his employees with medical aid when so badly injured that they could not care for themselves, the common law, as in the cases of the safety appliances before mentioned, breathed an implied agreement or duty on the part of the former to furnish the latter medical or surgical aid whenever he was so badly injured that he could not care for himself.

This law, like the one previously mentioned, has no statutory origin, but has ripened into a law from wise and humane usages and customs that are so old that the memory of man runneth not to the contrary, and will continue so long as the conduct of man is prompted and governed by love and humane sentiments.

As previously stated, I am firmly of the opinion that the petition stated a good cause of action against the defendant, and that the evidence was sufficient to make a case for the jury; and so believing, I think the action of the trial court in granting a new trial to the plaintiff for the first and second reasons assigned by counsel for defendant, was not erroneous, but proper.

II. Counsel for plaintiff contends that the evidence tended to show that the defendant was guilty of negligence in not properly treating Hunicke after it undertook to so do.

**Evidence of
Improper
Treatment.**

Counsel have neglected to call our attention to that evidence, and after a careful reading of the record, I have been unable to find any evidence tending to support that contention.

The defendant did not undertake to treat the plaintiff until he reached the hospital in St. Louis, where his leg was promptly amputated, and there is not a word of evidence tending to show that the operation was not done in a proper and skillful manner. This contention is untenable.

III. This brings us to the consideration of the grounds assigned by the trial court for granting a new trial, which read as follows:

Instructions.

“The instructions given for plaintiff and for the defendant are contradictory, and I think the sixth instruction for defendant is not the law. Motion for new trial sustained.”

It is contended, and the trial court so held, that there was an irreconcilable conflict between instructions numbered four and six, given for the defendant.

By reading the fourth it will be observed that the court instructed the jury that, if after Hunicke was injured the defendant exercised ordinary care to secure for him medical and surgical aid, then the defendant had fully discharged its duty to the deceased, and that there could be no recovery in this case.

This instruction is in harmony with those given for the plaintiff, in that it assumed that the defendant owed Hunicke the duty to furnish him emergency treatment. That was a correct statement of the law. But when we read defendant's instruction numbered six

it is seen that it tells the jury that if they were unable to determine whether the deceased would have died from the injury received, even though proper medical assistance had been promptly furnished him, then they should find for the defendant.

The effect of this instruction was to tell the jury that the defendant owed the plaintiff no duty whatever, unless the jury could determine an impossibility, namely, that Hunicke would not have died had proper medical attention been given him. God alone knew that fact, and no man or jury could determine that which no one knows, and which the evidence could not possibly reveal.

The law is, that just as soon as an injury of this character occurs, it then becomes the duty of the master to furnish medical treatment, and if he neglects to use reasonable efforts to do so, and the evidence shows that in all reasonable probability that failure was the proximate cause of the death, then the defendant was liable. In other words, in such a case, the court should have instructed the jury for the plaintiff that, if they believed from the evidence that the negligence of the defendant in not furnishing medical treatment for the injured party was the direct and proximate cause of his death, notwithstanding the injury, then they should find for the plaintiff; but upon the other hand, the court should have instructed the jury for the defendant, that if they believed from the evidence that the injury Hunicke sustained was the direct or proximate cause of his death, then they should find for the defendant.

Such an instruction would have eliminated from the case all metaphysical speculations, and have submitted to the jury which of the two acts mentioned caused the death.

I am, therefore, clearly of the opinion that these two instructions are in conflict with each other; and that said instruction numbered six, for the same rea-

son, is in conflict with those given for the plaintiff, and should not have been given.

For the reasons stated, we are of the opinion that the action of the trial court in granting a new trial was correct; and that the judgment should be affirmed.

It is so ordered. All concur.

VIOLA TAWNEY, Appellant, v. UNITED RAILWAYS COMPANY OF ST. LOUIS.

In Banc, December 19, 1914.

1. **NEGLIGENCE: Instruction: Legal Presumption of No Negligence: Modification.** An instruction for defendant stating to the jury the legal presumption that the injury or accident was not "due to any fault or want of care on the part of defendant," if it goes on to tell them to disregard the legal presumption if they believe the evidence introduced by plaintiff in support of her cause of action, but to find for defendant if they disbelieve it, or if they believe the weight of the evidence to be with defendant on the issue of negligence, or if the conflicting evidence simply creates an equilibrium of proof, is not erroneous.
2. ———: ———: **Injured "In Any Other Way."** An instruction for defendant that tells the jury that plaintiff cannot recover if her husband was injured "in any other way" than as set forth in the allegations of specific negligence contained in the petition, is not error, even though there is evidence that he was injured by malarial fever, if other instructions require the jury in unmistakable terms to confine their attention to the specific injuries alleged.
3. ———: ———: **Converse of Plaintiff's.** If plaintiff is given an instruction on the theory that if the street car started prematurely defendant was chargeable with his injury, defendant is entitled to one submitting the converse theory, namely, whether the car upon which plaintiff's husband desired to embark stopped a reasonable time to permit him to do so with safety, even though there is no testimony that he "waited an unreasonable time before attempting to board the car."
4. **REMARKS OF COUNSEL: No Exception.** Appellant cannot complain if he did not except to the failure of the court to

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further reprimand counsel for stating as a fact something not shown by the evidence, where the court as soon as the statement was made contradicted it and said his contradiction was made in "correction of the statement of counsel."

5. **JUROR: Friendliness to Defendant's President.** A juror who states on his *voir dire* that he has known defendant's president for thirty-five years and that their relations are very friendly, but states that such friendship will not influence his verdict, and that he will be guided by the evidence and the instructions of the court, is not incompetent.
6. **NEGLIGENCE: Evidence: No Report of Injury.** It was not reversible error to permit defendant's claim-agent to testify that the custom and due course of business required a report of an accident or injury to a would-be passenger to be made by the street car conductor to defendant's managing officers for their information, and that no such report of the injury to plaintiff's husband was made. But the only relevancy of such testimony is to shed light upon the conduct of defendant in failing to take such steps as prudence would have suggested if it had been informed of the accident.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench*, Judge.

AFFIRMED.

Earl M. Pirkey for appellant.

(1) It is error to instruct juries concerning presumptions of negligence. For this reason instruction 6 is erroneous. *Connelly v. Railroad*, 133 Mo. App. 310; *Bailey v. Railroad*, 152 Mo. 461; *Haynes v. Trenton*, 123 Mo. 332; *Ham v. Barrett*, 28 Mo. 388; *Myers v. Kansas City*, 108 Mo. 487; *Rapp v. Railroad*, 106 Mo. 428; *Moberly v. Railroad*, 98 Mo. 183; *Miller v. Canton*, 112 Mo. App. 322; *Morton v. Heidorn*, 135 Mo. 616; *Payne v. Railroad*, 129 Mo. 419; *Schepers v. Railroad*, 126 Mo. 670; *Cole v. Fitzgerald*, 132 Mo. App. 24; *Hutchinson v. Gate Co.*, 247 Mo. 103. (2) Where counsel states during the trial, while not under oath, evidential facts prejudicial to the unsuccessful party, a new trial should be granted. *Haynes v. Trenton*, 108

Mo. 133; Barnes v. St. Joseph, 139 Mo. App. 545; Trent v. Printing Co., 141 Mo. App. 452; Gore v. Brockman, 138 Mo. App. 234; Shohoney v. Railroad, 223 Mo. 684. (3) The fact that plaintiff received insurance on the life of her husband did not debar her from suing for the death of her husband. Harding v. Railroad, 248 Mo. 669. (4) In the administration of justice the jurors should, as far as human precaution can avail, be free from bias or influence. Billmeyer v. Transit Co., 108 Mo. App. 6; Theobald v. Transit Co., 191 Mo. 395; Carroll v. United Rys., 157 Mo. App. 247; Heidbrink v. United Rys., 133 Mo. App. 40. (5) Testimony that it is the custom of a street car company to investigate is inadmissible. Ellis v. Met. St. Ry., 234 Mo. 685. (6) A report made by an employee of a street car company to the company is inadmissible. Setzler v. Met. St. Ry., 227 Mo. 470; Gardner v. Met. St. Ry., 223 Mo. 413.

Boyle & Priest, A. N. Sager and T. M. Pierce for respondent.

(1) Instruction 6 was proper since in effect it merely advised the jury that no negligence could be presumed from the happening of an accident and injury, and that unless the plaintiff proved her case by a preponderance of the evidence, she must fail. Hutchinson v. Gate Co., 247 Mo. 103; King v. Ringling, 145 Mo. 293; 1 Shearman and Redfield on Negligence (4 Ed.), sec. 59. Instruction 4 was proper since it limited the plaintiff's right to recover to the specific negligence pleaded. The jury could not have been misled into thinking that plaintiff could not recover if her husband had been affected by malarial or typhoid fever, because at her request the court had previously charged the jury in instruction 2 that "notwithstanding you may further believe from the evidence that said Louis C. Tawney had suffered from malaria fever,

provided that the jury further find from the evidence that he would not have died at the time, under the circumstances, and in the manner he did die, had it not been for being thrown and falling from said car, if the jury find from the evidence this occurred." *Stid v. Railroad*, 236 Mo. 400; *Beave v. Railroad*, 212 Mo. 352; *Gardner v. Railroad*, 223 Mo. 419. Instruction 5 was proper because it merely set forth the specific negligence pleaded, and told the jury that if they believed to the contrary they should find for the defendant. *Sterrett v. Railroad*, 225 Mo. 111. (2) Counsel for defendant did not commit error in his argument to the jury, because the court corrected him at once, nor did the plaintiff save an exception at the time. Even had the statement been erroneous the appellant could not now take advantage of such error in the absence of an exception. *Torreyson v. Railroad*, 246 Mo. 706. (3) No error was committed in overruling the challenge of the plaintiff to the juror Foskett, because it did not appear that the juror was prejudiced against the plaintiff or in favor of the defendant. *McManama v. Railroad*, 175 Mo. App. 45. (4) The evidence of Hardin, the claim agent, was properly admitted because it is competent to prove by the head of a department that the report of no accident reached him, when he would in the due course of business, have heard of such an accident had it occurred. This is competent upon the theory that the defendant has a right to explain why it introduces no witnesses to testify about an accident, when it contends that no accident actually occurred. *Fleishman v. Ice & Fuel Co.*, 163 Mo. App. 422; 1 *Wigmore on Evidence*, sec. 286; *Bigelow v. Railroad*, 48 Mo. App. 372. (5) The verdict was for the right party and should be sustained irrespective of any technical errors. *R. S. 1909*, sec. 2082; *Carr v. Railroad*, 195 Mo. 214; *Wabash v. Slook*, 200 Mo. 219; *Saxton v. Railroad*, 98 Mo. App. 503.

STATEMENT.

Plaintiff is the widow of Louis C. Tawney, and brings this action for damages for his death, which she alleges was caused by the negligence of the agents of the defendant street car company, in negligently causing and permitting one of its cars which had stopped at a crossing to take passengers "to suddenly start and go forward" before her husband (who desired to take passage and for that purpose had mounted the first step of the rear platform) had time to get further on the car and reach a place of safety, thereby causing him to fall and be thrown from said car and to suffer the injuries sued for. This was alleged to have happened on the 29th of November, 1909. The husband died on December 17, 1909. The damages were laid at ten thousand dollars. The answer of the defendant was a general denial and a plea of contributory negligence. The case was submitted to a jury, who rendered a verdict for the defendant.

On the trial, plaintiff adduced evidence tending to prove that her husband fell or was thrown from the car in the manner described in her petition; that he came home on another car with a bruise on his cheek about the size of a dollar and with dirt on his clothes and took to bed; that her daughter called up a physician in the employ of the defendant, who attended him about ten days; that thereafter, and until his death, he was attended by his family physician, Dr. Upshaw. The evidence showed that plaintiff's husband had suffered from typhoid fever for about four months, beginning July, 1909, and had afterwards been afflicted with malarial fever; that about ten days before the accident, his physician had given him permission to go out. This physician testified that in the condition which the patient was at the time of the accident, the effect of such an injury as he received could have caused his death. He admitted that he made out the

death certificate of plaintiff's husband, and stated therein that his death was caused by malaria. The doctor representing the defendant, who had attended the deceased for ten days after the accident, testified that such an injury as he received could not have caused his death; that upon a second examination of his patient, he found him suffering from an enlarged spleen and other symptoms of malaria, and he thought his death was caused by "pernicious malaria." He admitted that prior to this examination he might have told a police officer that he thought the deceased was suffering from a concussion of the brain, but that he ascertained, after a fuller examination made, when he got the history of his sickness from his wife, that such was not the fact. Defendant introduced evidence tending to disprove the happening of the injury, or any knowledge thereof, on the part of its conductor or motorman, or any report in relation thereto being made to its officers.

Plaintiff duly appealed, assigning errors intervening on the trial.

OPINION.

I.

BOND, J. (After stating the facts as above).—Appellant complains of instruction numbered 6 given on behalf of defendant, for that said instruction, among other things, stated to the jury the legal presumption that the injury or accident to her husband was not "due to any fault or want of care on the part of the defendant." The point of objection to this in-

**Presumption
of no
Negligence.**

struction is that since there was evidence in the case which warranted the court in submitting the issue of negligence to the

jury, the instruction should not have mentioned this legal presumption applicable to cases where nothing is shown but the bare fact of an injury or accident for which redress has been sought. The instruction, how-

ever, did not stop with the statement of the presumption of law in such cases, but stated to the jury in substance that it was to be disregarded by them, if "plaintiff has established the facts entitling her to a verdict, as in other instructions defined, by the great weight of all the other evidence before made." The only difference being that the court conveyed this idea by the use of two negatives "*cannot* be disregarded by you *unless*, etc." This was simply an equivalent mode of stating the proposition. This direction was further clarified by other language contained in the instruction to the effect that the jury were at liberty to find for the defendant if they "found the greater weight of the evidence upon the issue defined in these instructions to be against the plaintiff and in favor of the defendant," or in case of their inability "because of conflicting testimony to conscientiously determine upon which side the credible evidence preponderates." The plain meaning of this instruction was that the jury should disregard the legal presumption with which it was prefaced if they believed the evidence introduced by plaintiff in support of her cause of action, but that they should find for the defendant if they disbelieved the testimony given in support of plaintiff's right to redress, or if they believed the weight of the evidence was with the defendant on the issue of negligence, or if the conflicting evidence simply created an equilibrium of proof. For in either of these alternatives the legal presumption would reapply. This instruction stated the duty of the jury upon the issuable fact of negligence to find for the plaintiff if the evidence preponderated in her favor and to find for the defendant if it did not. This was correct, for in the event the plaintiff made no case, by affirmative proof of negligence, the legal presumption would obtain. In the absence of proof of negligence, such a presumption arises in all cases where the doctrine of *res ipsa loquitur* does not apply. The reason being, that in all other cases

the party who alleges negligence must prove it by other evidence than the happening of the injury. The learned trial judge correctly conceived the law in this respect and embodied it in a carefully guarded instruction, since there was no claim in this case that the rule of *res ipsa loquitur* had any application whatever.

II.

Appellant also complains of instruction numbered 4, wherein the court in substance told the jury that if appellant's husband was injured "in any other way" than as set forth in the allegations of specific negligence contained in the petition, there could be no recovery in this action. Appellant says that the deceased "was injured by malarial fever," and the jury under this instruction might have thought that a verdict for defendant would be justified upon that conceded fact. To this it need only be answered that such a misunderstanding was impossible under the language contained in the last clause of instruction numbered 2 given on behalf of appellant, wherein the jury were told (an instruction covering the case), to-wit: "then you will find for the plaintiff, notwithstanding you may further believe from the evidence that said Louis C. Tawney has suffered from malarial fever, provided that the jury further find from the evidence that he would not have died at the time, under the circumstances, and in the manner he did die, had it not been for being thrown and falling from said car, if the jury find from the evidence this occurred."

It has been uniformly held in this State, as stated in an opinion by the writer, quoted in appellant's brief, to-wit:

"The rule reading together all the instructions given in a case, warrants the supplementing of an imperfect by a perfect instruction; or, in other words, the curing of omissions in one instruction by a complete and correct statement in another one; but it does

not go to the extent of holding that an instruction given for respondent which is radically wrong—that is, perverts the law or prejudices the facts—can be cured by another on behalf of the same party which is free from the vice of the former. Such repugnant directions afford no guide to the jury, nor can it be presumed that they followed one rather than the other.”

The foregoing language was used, with a slight verbal correction of error in print in *Desnoyers Shoe Co. v. Lisman & Ramsey*, 85 Mo. App. 1. c. 344, and *Linn v. Massilon Bridge Co.*, 78 Mo. App. 1. c. 118.

The language quoted from appellant's instruction when considered with that contained in the instruction complained of, prevented any misapprehension in the minds of the jury of the nature of the injury sued for in this action. The actionable injury for which this suit was brought was caused to the husband of appellant by his falling or being thrown from a car of the respondent. This suit was not brought for any other injury suffered by him. This was correctly stated in the instruction complained of and to prevent the possibility of error in the mind of the jury, appellant, as shown above, stated in the most explicit terms to them that they should confine their investigation to the effects of that injury in causing his death, and should leave out of view any consideration of his prior sickness, if they believed that the *efficient* cause of his death was the negligence charged in the petition. Under the rule above quoted, these two instructions supplied a full and complete view of the applicatory law to the triers of the fact. If there was any omission or imperfection in the instruction given for the respondent, it was supplemented by the perfect and complete instruction given at the request of appellant.

This assignment of error is therefore overruled.

Appellant complains of instruction numbered 5, given on behalf of respondent, wherein the court submitted to the jury the question of whether or not the

car upon which deceased husband desired to embark, stopped a reasonable time to permit him to do so with safety. Appellant's contention being, that there was no evidence to show that the deceased "waited an unreasonable time before attempting to board the car." This instruction simply stated the converse of the theory on which appellant's action was predicated, which was that the car started prematurely, and appellant submitted that issue to the jury as one of the elements of the negligence attributed to respondent, and in other instructions appellant set forth the definition of the degree of care to be observed by respondents with respect to persons desiring to become passengers on its line. We are therefore unable to concur in the objection urged by appellant to instruction numbered 5.

III.

Another point made by appellant is that during the course of the argument the attorney for respondent stated in substance that money was paid to her by an insurer upon the statement that her husband had died of malaria. That statement was objected to by appellant's attorney, and the court stated to the jury that "there was no payment of money shown by the record," and that this was a "correction by the court of the statement of the counsel." Appellant did not except to the action of the court in refusing to further reprimand the counsel than by its said corrective statement. This assignment of error presents nothing for review. [Torreyson v. United Railways, 246 Mo. l. c. 706.]

Appellant finally urges that the court erred in not sustaining her challenge to juror Foshett. This juror on his *voir dire* examination stated that he knew an officer of the company, Captain McCulloch, for over thirty-five years, and that their relations were very friendly. When this had been brought out by appellant's attorney, and the further fact that the juror would have that feeling to contend against in render-

ing a verdict, although he would try to be fair in so doing, the court asked him, and he answered the following questions.

“By the Court: Q. Of course you realize that Capt. McCulloch is not the defendant here? A. Well, I recognize him as an officer of the company.

“Q. Would the fact that you happen to know him intimately be any reason why you cannot sit here as a juror and be sworn to hear the testimony impartially and weigh it as between the testimony on the one side and on the other, and then listen to the instructions of the court and decide the case according to that evidence that you have heard and in accordance with the instructions of the court, disregarding any acquaintance you may have with either side? A. I surely would.

“The Court: The challenge is overruled.”

It will be perceived that while the juror candidly admitted his friendship for Capt. McCulloch, he also stated that fact would not influence his judgment in the consideration of the case, but that he would be guided by the weight of the evidence and the instruction of the court. We think there was no error in overruling the challenge to this juror. [McManama v. Railroad, 175 Mo. App. 1. c. 48-49, and cases cited.]

Appellant finally complains that respondent was permitted to introduce its claim-agent, who testified as to the absence of any report to the heads of the department of the respondent company of any accident to appellant's husband, and the custom and due course of business requiring such reports in all cases of accidents for the information of the managing officers of the respondent. This evidence had no probative force in disproof of the occurrence of the injury. Its only relevancy was to shed light upon the conduct of respondent in failing to take steps which prudence would have suggested if it had been informed of the happening of the accident, and to rebut the unfavorable infer-

State ex rel. v. Robertson.

ences which might have been drawn from the subsequent conduct of respondent. [1 Wigmore on Evidence, sec. 286.] We do not think its reception was reversible error.

A careful consideration of the record in this case discloses that the issues were presented fully in well-drawn instructions, prepared for appellant and given by the court. The jury, after weighing the evidence, reached the conclusion that appellant had failed to establish the cause of action alleged. With their conclusions, as to the weight of the evidence, we have nothing to do, provided they were arrived at, as we have found, without prejudicial error intervening at the trial.

The judgment in this case is therefore affirmed. All concur.

THE STATE ex rel. ALBERT ZEHNDER et al. v.
WILLIAM R. ROBERTSON et al., Judges of the
Springfield Court of Appeals.

In Banc, December 19, 1914.

1. **CERTIORARI: Conflict in Opinions.** *Certiorari* may be used to bring to the Supreme Court a case in which a Court of Appeals has rendered an opinion in conflict with the last previous decision of the Supreme Court, whether that last decision be right or wrong.
2. **LOCAL OPTION LAW: Information: Allegation of Adoption in County.** An information, attempting to charge a violation of the Local Option Law, is not sufficient unless it charges both that the law has been adopted and is in force; nor would it be sufficient if it charged only that it had been adopted, for it may have been adopted and never put into force for lack of the necessary statutory notice. But if it charges that the law "was in full force and effect" in the county where the offense was committed, designating it by article and chapter, it charges that it had been adopted and was in force, for

it could not well be in full force and effect unless it had been adopted.

3. ———: ———: **Conflict in Opinions: Certiorari.** The last previous decision of the Supreme Court, and its previous rules as well, was to the effect that an indictment or information charging a violation of the Local Option Law must charge that the law had been adopted and was in force and effect in the county; and therefore a decision of the Court of Appeals holding that an information charging that the said law was at the time the offense was committed "in full force and effect in the county" was sufficient, was not in conflict with the last previous decision of the Supreme Court on the subject, but in harmony therewith, and its said decision will be upheld upon *certiorari*.

Certiorari.

WRIT QUASHED.

Frank H. Farris, J. J. Crites and J. A. Watson for relators.

(1) The right of the relators to invoke this remedy and the right of this court to issue its writ of *certiorari* is now fully determined, and cannot be questioned. *Thomas v. Mead*, 36 Mo. 232; *State ex rel. v. Broadbuss*, 238 Mo. 189; *State ex rel. v. Broadbuss*, 245 Mo. 123; *Curtis v. Sexton*, 252 Mo. 221; *State ex rel. v. Ellison*, 256 Mo. 644. (2) The information in this case was fatally defective; it did not allege that the Local Option Law had been adopted in Phelps county. And that it was a material allegation, and was required to be supported by proof and the holding of the court that the adoption of the law could be presumed or taken by intendment was in conflict with the decisions of this court, and with all of the courts of appeals in Missouri, and overruled in terms the established rule of law as fixed by the opinions of this court and the St. Louis Court of Appeals and the Kansas City Court of Appeals. 22 Cyc. 293; 3 *Greenleaf on Evidence* (8 Ed.), par. 10; 1 *Bishop's New Criminal Procedure*, pp. 83, 84; 23 Cyc. 222; *McLain on Criminal Law*, 1232;

Cook v. State, 25 Fla. 698; Commonwealth v. Throckmorton, 32 S. W. (Ky.) 130; Commonwealth v. Boyd, 32 S. W. (Ky.) 132; Commonwealth v. Howe, 32 S. W. (Ky.) 133; Commonwealth v. Shelton, 35 S. W. 128; Norton v. State, 65 Miss. 297; State v. Chambers, 93 N. C. 600; Stewart v. State, 35 Tex. Cr. 391; Alford v. State, 37 Tex. Cr. 386. Every material allegation must be pleaded and a material allegation is such as must be proven. State v. Thierauf, 167 Mo. 444; State v. Hagan, 164 Mo. 659; State v. Phelan, 159 Mo. 122; State v. Patterson, 159 Mo. 102; State v. Evans, 128 Mo. 407; State v. Rector, 126 Mo. 328. These cases all hold in terms, if not in express words, that an information for a violation of the Local Option Law must charge that the law had been adopted. State v. Searcy, 39 Mo. App. 399; State v. Hutton, 39 Mo. App. 416; State v. Prather, 41 Mo. App. 458; State v. Hall, 130 Mo. App. 172; State v. Campbell, 137 Mo. App. 108; State v. Snider, 151 Mo. App. 702; State v. Wainwright, 154 Mo. App. 654; State v. Wright, 161 Mo. App. 600; State v. Dugan, 110 Mo. 143; State v. Searcy, 111 Mo. 236.

Corrie L. Arthur for respondents; *C. C. Bland* of counsel.

(1) The rule quoted by relators that "in every indictment and information every fact necessary to constitute the crime charged must be directly and positively alleged, and nothing can be charged by implication" (19 Cyc., 293) is applicable in its strictness to indictments and informations for a felony. State v. Ferguson, 152 Mo. 92. In misdemeanors less particularity and nicety in describing the offense is required than in felonies. State v. Hogle, 156 Mo. App. 367; State v. Seibeling, 143 Mo. App. 318; State v. Rowell, 137 Mo. App. 620; State v. Wainwright, 154 Mo. App. 653; State v. Fancher, 71 Mo. 460. (2) The information was sufficient. State v. Dugan, 110 Mo. 138; State

v. Searcy, 111 Mo. 236. (3) The opinions of the Springfield Court of Appeals in the two Zehnder cases are in harmony with and are supported by the cases of State v. Campbell, 137 Mo. App. 105, and State v. Gallatin, 161 S. W. 848. (4) The allegation in respect to the Local Option Law being in force, of necessity includes the fact that it had been adopted, and was sufficient. State v. Rowell, 137 Mo. App. 620; State v. Hogle, 156 Mo. App. 336. The allegation is a statement of the ultimate facts, a sequence that followed from an election held under the provisions of article 3, of chapter 63, which resulted against the sale of intoxicating liquors within the boundaries of Phelps county, the order of the county court declaring the result of the election, and the publication of the result as required by law. It is a statement of the last in a train of sequences which resulted in the adoption of the law, and the putting it in force throughout the county. It is a statement of sequence which led to the end alleged, and includes all the preceding facts or steps required to put the law in operation. State v. O'Brien, 35 Mont. 482. It certainly included and was equivalent to a statement that the law had been adopted by the people of Phelps county. State v. Campbell, 137 Mo. App. 105; State v. Gallatin, 161 S. W. 848; State v. Brown, 151 Mo. App. 349.

GRAVES, J.—*Certiorari* to the Springfield Court of Appeals. To our writ the judges of that court have made due return. From the record before us in the instant case it appears that Albert Zehnder, Adalbert Kolb and Fritz Diir, were convicted in the circuit court of Phelps county, for the sale of liquor in violation of the Local Option Law, then in force in said county. From this judgment of conviction they appealed to the Springfield Court of Appeals, and in that court the judgment was affirmed as to Zehnder and Kolb, but reversed and remanded as to Diir. The information

upon which the defendants in the circuit court were convicted reads:

"Corrie L. Arthur, prosecuting attorney in and for the county of Phelps, in the State of Missouri, informs the court that on the first day of April, 1913, and at all times hereinafter mentioned, the provisions of article 3, chapter 63, Revised Statutes 1909, known as the Local Option Law, was in full force and effect in the aforesaid county of Phelps, and that the defendants thereafter, to-wit, on the fifth day of December, 1913, at and in the said county of Phelps, did directly and indirectly sell intoxicating liquors, to-wit, one pint of beer at and for the sum of ten cents, and one pint of whiskey at and for the sum of ten cents, without then and there having a dramshop license or other legal authority authorizing them so to do, against the peace and dignity of the State.

"Prosecuting Attorney, Phelps County, Missouri.

"Corrie L. Arthur, prosecuting attorney, being sworn upon his oath, says that the above and foregoing information and the facts therein stated, are true according to his best knowledge, information and belief.

"Subscribed and sworn to before me, the undersigned notary public, this sixth day of December, 1913.

"(Seal)

"CLARK C. BLAND,

"Notary Public."

The sufficiency of this information was challenged by motion to quash, motion for new trial and motion in arrest of judgment in the circuit court, and again challenged in the Court of Appeals, throughout the record there. That court held that the information was sufficient in language and in form, and that the verification thereto was good. This latter question as to the verification, whilst a live one in the Court of Appeals, is not such here. This, for the reason that it is not charged that the ruling of the Court of Appeals upon that matter is in conflict with any ruling of this

court. In the instant case it is charged that the ruling of the Court of Appeals as to the sufficiency of the information is in conflict with the ruling of this court in the cases of *State v. Dugan*, 110 Mo. l. c. 143, and *State v. Searcy*, 111 Mo. 236. The point made is that the information does not allege the adoption of the Local Option Law in Phelps county, and that the opinion of the Court of Appeals conflicts with the view of this court in regard to the sufficiency of the information. The issue is therefore sharp and pointed.

I. Counsel for respondents have gone to the different States and present an array of authorities bearing upon the sufficiency of the information in this case. Some of these go to the length that the court will take judicial notice of the adoption of such laws. But in *certiorari* of the kind and character involved here, we are not really concerned as to what the true rule should be, but are only concerned with what the rule is in Missouri, as established by this court prior to the time the Court of Appeals acted. The purpose of the writ of *certiorari* to an inferior appellate court, is to keep their rulings in harmony with our rulings upon the same subject, so that all appellate opinions may speak as with *one* voice upon any one particular question. It would hardly be expected in this kind of a case that we would quash the Court of Appeals judgment, if it was made clear that they had followed our latest ruling upon the identical question, although our ruling might be wrong. The Constitution requires these courts to follow our latest ruling, and we cannot convict them of error if they so do, whether we were right or wrong.

The sole question therefore is: Did the Springfield Court of Appeals do violence to one of this court's latest opinions, when it held that this information properly charged the adoption of the Local Option Law in Phelps county?

Conflict in
Opinions:
Certiorari.

We are not concerned about there being a more logical or better pronouncement of the law elsewhere. That subject may be more properly urged in some case here regularly in the course of appellate practice. The sole question in this case we take up next.

II. We are fully satisfied with the former holdings of this court as to what should be stated in an indictment or information under the Local Option Law. In *State v. Searcy*, 39 Mo. App. 1. c. 399, THOMPSON, J., said:

“We hold that it is sufficient in such a case for the indictment to allege that the act of the Legislature approved April 5, 1887, known as the Local Option Law, has been duly adopted and was in force as the law of the State within the territory within which the offense is laid, at the date of the alleged offense, without reciting in detail the manner in which it was so adopted, which is merely the pleading of evidence. So much of the indictment in the present case as went beyond this may, therefore, be rejected as surplusage; and the fact that it erroneously states the date of the act of the Legislature as April 5, 1888, instead of April 5, 1887, is of no importance, since there is but one act by that title and the clerical error is one which corrects itself.”

This court, through MACFARLANE, J., in the case of *State v. Dugan*, 110 Mo. 1. c. 143, approved the language used by Judge THOMPSON. We then said:

“The indictment need only have alleged ‘that the act of the Legislature approved April 5, 1887, known as the Local Option Law, has been adopted, and was in force as the law of the State,’ within the city of Warrensburg at the date of the alleged offense, ‘without reciting in detail the manner in which it was adopted.’ [*State v. Searcy*, 39 Mo. App. 393; *State v. Prather*, 41 Mo. App. 455.]”

We again approved this language from Judge THOMPSON, in the case of *State v. Searcy*, 111 Mo. 236, where that case reached this court upon a certification of the Court of Appeals. So that it may be said that this court is committed to the doctrine that the allegations of the information or indictment under the Local Option Law must be such as to aver the adoption of the law in the territory where the crime is committed and that said law was in force in the said territory. The allegation must be broad enough to cover not only the fact that the law had been previously adopted within the territory, but that it was in force therein at the time. This is true for the reason that after the adoption of the law, a notice must be published before it can go into effect. The law might be adopted by a proper vote and yet never be put in force by the proper notice. For this reason the allegation in the indictment or information must be broad enough to cover both ideas, i. e., (1) that the law has been previously adopted, and (2) that it was at the time of the alleged offense, actually in force. This is the Missouri rule as to the requisites of an indictment or information under the Local Option Law, and we see no good reason to depart from the rule. It is one which bespeaks fairness to the defendant, by advising him by the indictment or information just what crime he is called upon to defend. There being several laws under which sellers of liquor may be prosecuted, it is but right that the indictment or information should by appropriate language, indicate the crime intended to be charged.

The question in the case at bar is whether the charge in this information measures up to this rule approved by this court in the cases, *supra*. It does not in specific terms allege the previous adoption of the Local Option Law in Phelps county. The language of the information is: "On the first day of April, 1913, and at all times hereinafter mentioned, the provisions of article 3, chapter 63, Revised Statutes 1909, known as the

Local Option Law, was in full force and effect in the aforesaid county of Phelps." We think this language is broad enough to make the information good within the approved rule of pleadings in this court. The Court of Appeals so held after a review of our cases, and we think that their ruling was correct, and in no-wise conflicts with the cases cited.

The same strictness of pleading in misdemeanors is not required as is required in felonies. This information averred in proper terms that the Local Option Law was in force in Phelps county at the date of the alleged offense. This allegation of said law being in full force and effect includes the idea of its previous adoption. It could not be in full force and effect unless it had been previously adopted. So that we say that the allegation in this information is equivalent to saying that the Local Option Law had been previously adopted in Phelps county, and at the date of the alleged crime, was then in force in said county. If such is the fair interpretation of the language of this information (and we think it is) then the ruling of the Court of Appeals in so holding does no violence to any previously ruled case in this court. With these views it follows that our writ of *certiorari* heretofore issued in this cause should be quashed as having been improvidently issued. It is so ordered.

All concur; *Bond, J.*, in result only.

HAFNER MANUFACTURING COMPANY, Appel-
lant, v. CITY OF ST. LOUIS.

Division One, December 19, 1914.

1. **FORCIBLE ENTRY AND DETAINER: Title.** The rule that in actions of forcible entry and detainer title is not an issue, is to be taken in the sense that title is not tried out as a determinative factor. It does not mean that title is not to be considered for any purpose.

2. ———: ———: **No Exception.** Where no exception was saved to the ruling of the court admitting a deed describing the property in suit in an action of forcible entry and detainer brought against the city which claims the land is a part of a public wharf "on the ground that it is offered solely for the purpose of showing that the property in question is part of the public wharf," it will not be *held* on appeal that error was committed in admitting said deed in evidence. On appeal only exceptions ruled in the trial court are considered.
3. **OBJECTIONS: General.** An objection to proffered evidence that it is incompetent, irrelevant and immaterial is of no sensible use in the administration of justice, and is unavailing as an assignment of error.
4. ———: ———: **Ordinance: Violative of Constitution and Statutes.** An objection to the admission of an ordinance in evidence to the effect that it is violative of the Constitution and laws of the State, without any designation of what provision of the Constitution or what specific law it contravenes, is too general and vague.
5. **FORCIBLE ENTRY AND DETAINER: Title: Circumstances: Judgment in Ejectment.** In forcible entry and detainer, the question of lawful possession and unlawful ouster, and not the title to the land, is the matter for adjudication; but what constitutes possession must depend upon circumstances. The records in an ejectment suit, brought by plaintiff's ancestor against the city, in which it was held that a certain tract of land, of which that in suit is a part, was a public wharf belonging to the city, though said part has never been reduced to actual wharf uses, may be offered in evidence for the purpose of showing the character of possession of the plaintiff in the land in suit, since the purposes for which it has been used has an influence in arriving at common-sense conclusions as to whether or not plaintiff has been in possession. If the judgment record in the ejectment suit is not used as a basis for a finding in the unlawful detainer suit, that is, the case is not made to turn on title, the evidence can do no harm.
6. **PUBLIC WHARF: Is Public Highway.** A public wharf on a navigable stream, connected with public streets and in a sense an extension of such streets, is in the eyes of the law a public highway; and the rights of the city in and its duties towards it are akin to its rights and duties towards its public streets.
7. ———: **Forcible Entry: Removal of Obstruction.** No person has a right to the exclusive use of a tract of land owned and dedicated by the city to public use as a wharf, any more than he has a right to the exclusive use of a public street; and the city has the right, when authorized thereto by its charter

Hafner Mfg. Co. v. St. Louis.

and ordinances, to remove any obstructions to such general public use of the wharf tract placed thereon by one asserting an exclusive use thereto.

8. ———: ———: **Lawfully Possessed.** A complainant in a suit of forcible entry and detainer is bound to make proof that he was lawfully possessed of the premises and that defendant unlawfully entered into and detained the same; and "lawfully possessed" is used in the sense of "peaceable possession." But peaceable possession does not mean possession obtained by force and a strong arm, or in tortious violation of the owner's right, nor does it mean a possession that is a mere sham.
9. ———: ———: ———: **After Suit in Ejectment.** One cannot be said to be in lawful possession of land, after it has been adjudged by a suit in ejectment that his ancestor was not the owner, but that it was a part of a tract belonging to the city and dedicated to public use for wharf purposes, who piled lumber thereon, and then before the city undertook to remove obstructions therefrom and in contemplation thereof removed all his lumber except a few weather-stained boards and some stakes used in piling.
10. ———: ———: **Unlawful Detainer: City.** It cannot be said that a municipal corporation, which, in the exercise of its charter and ordinance right to remove obstructions from public wharfs and streets, removes a few weather-stained plank and piling stakes from a part of a tract of land which has been adjudged by suit in ejectment to belong to it and has by it been dedicated to a public wharf, has thereby "unlawfully entered into and detained" said premises.
11. ———: ———: ———: ———: **Improvement.** Nor is the question of complainant's lawful possession or the city's unlawful entrance affected by the fact that the city had not improved so much of the public wharf as complainant claims, but had improved the balance.
12. ———: ———: **Selling Complainant's Personal Property Thereon.** Nor is the action of forcible entry and detainer to be affected in any wise by the fact that the city in the exercise of its municipal right to remove obstructions from a public wharf, in entering upon the land to remove the obstructions seized certain lumber belonging to complainant and sold it at public auction. Damages on that score cannot be awarded in such a suit.

Appeal from St. Louis City Circuit Court.—*Hon.*

William M. Kinsey, Judge.

AFFIRMED.

E. P. Johnson and Richard A. Jones for appellant.

(1) The property in suit directly adjoining on the east other property of complainant, was in the peaceable, undisputed and uninterrupted possession of complainant for some six years immediately preceding and up to the time it was dispossessed by defendant. November 21, 1910. The property is unimproved, neither paved nor in any manner fitted for wharf purposes and used by complainant as a lumber yard. Defendant has never sought to, or in any manner used the property except, as is to be derived from its evidence, for a period beginning in 1891 and terminating prior to the occupancy by complainant, by leasing to individuals for occupancy and use in the conduct of private business. Under such conditions, and while complainant was in peaceable and undisturbed possession of this property and had been for a long period of years, by summary action, without judicial process or proceeding and against the protest of complainant, defendant, by its city marshal, dispossessed complainant, and confiscated and sold lumber, the property of complainant, which it found located on such real estate. Such action was without legal authority and in violation of the law of this State. R. S. 1909, secs. 7655, 7656; *Willis v. Stevens*, 24 Mo. App. 494. The action of the city marshal in entering upon and taking possession of such property was directed and claimed to be authorized by the mayor of defendant, acting under ordinance No. 25363 of defendant. It was in pursuance of demand theretofore made by the law department of the defendant, that complainant "remove from, vacate and surrender possession of that property, and that unless this is done forthwith, proper proceedings will be brought to secure the possession and to assess fines for the occupation of said property." The money

received from the sale by the defendant, of the lumber on the property, was, after payment of cost of sale, turned into and retained in its city treasury. That the action taken in such regard on the part of defendant constituted a forcible entry and detainer, is clear, and that such character of action may be maintained against a municipal corporation is determined by the authorities. *Dooley v. Kansas City*, 84 Mo. 444; *Edwardsville v. Barnsback*, 66 Ill. App. 381; *Oklahoma City v. Hill*, 4 Okla. 529; *Raines v. Oshkosh*, 14 Wis. 372. That complainant was in possession of the property at the time defendant entered thereon, and that defendant retained and was in possession at the time suit was brought and thereafter, are facts established without contradiction. Indeed, prior to entry, defendant, through its law department, demanded that complainant remove from said real estate, vacate and surrender possession thereof, and the order of removal afterwards signed by the mayor states: "that the following portion of the public wharf is obstructed, occupied, encroached upon and used by the Hafner Manufacturing Company as a lumber yard." Concerning defendant's possession at the time of filing suit it is alleged in its answer that it was at such time, and for more than fifty years prior thereto, in possession of such property.

William E. Baird and E. P. Griffin for respondent.

The character of possession claimed by the plaintiff in an action of forcible entry and detainer must be such as would, if uninterrupted, ripen into adverse possession. And, as there can be no adverse possession of public property against a municipality in Missouri, the plaintiff in this case could not, and did not, have any such possession as to support this action. The statutes provide that nothing in any Statute of

Limitations shall extend to any land given, granted, sequestered or appropriated to public use. This has been the law since August 1, 1866; R. S. 1909, sec. 1886; *State ex rel. v. Vandalia*, 119 Mo. App. 406; *Rochester v. Mining Co.*, 86 Mo. App. 447; *St. Louis v. Railroad*, 114 Mo. 13; *Brown v. Carthage*, 128 Mo. 10; *Wright v. Doniphan*, 69 Mo. 601; *Dillon on Municipal Corporations* (5 Ed.), secs. 1194, 1189. Not even the acceptance by the city of taxes from one claiming the assessed land by adverse possession will estop the city from asserting its claim thereto. *St. Louis v. Gorman*, 29 Mo. 593; *Wright v. Doniphan*, 69 Mo. 601. To the same general effect are the following: *Railroad v. Totman*, 149 Mo. 660; *Columbia v. Bright*, 179 Mo. 441; *Railroad v. Baker*, 183 Mo. 312; *State ex rel. v. Road Co.*, 207 Mo. 85. (2) The public wharf is to be legally regarded as a public highway. This is well established. *Backus v. Detroit*, 49 Mich. 110; *Matter of Brooklyn*, 73 N. Y. 179; *Woodruff v. Havemeyer*, 106 N. Y. 129; *Ice Co. v. Railroad*, 176 N. Y. 408; *Buffalo v. Railroad*, 190 N. Y. 84; *Steamboat Co. v. Steamboat Co.*, 109 U. S. 672; 1 *Elliott on Roads and Streets* (3 Ed.), sec. 1; *Eads v. Wooldridge*, 27 Mo. 251. (3) Under the statute relating to forcible entry and detainer, this action can be brought only when the plaintiff was lawfully possessed of the premises and the defendant unlawfully entered into same. R. S. 1909, sec. 7668. The so-called possession of the plaintiff in this case is tortious, and not merely constructively, but actually so. *Michau v. Walsh*, 6 Mo. 346. (4) This action cannot be maintained against the municipality for restitution of possession of public property because there was not and could not be any such entry by the defendant as is requisite to the maintenance of this action. *Railroad v. Johnson*, 119 U. S. 608; R. S. 1909, secs. 7655 and 7656. The statute is intended to prevent conflicts between individuals over private property, and not the assertion of the public right by public officials over

public property by authority of law. *Sitton v. Sapp*, 62 Mo. App. 204; *Craig v. Donnelly*, 28 Mo. App. 342; 19 Cyc., 1117, 1137 and 1138. (5) Lumber piled and maintained by an individual on the highway constitutes a nuisance, and, under the provisions of the St. Louis Charter, the mayor may summarily cause its removal. And the force involved in entering upon such property and removing such nuisance is not such as to constitute the offense of forcible entry, but the action of forcible entry and detainer is intended only to preserve the peace by preventing entry by private individuals on possession of other private individuals where entry is not given by law, and not to prevent entry by public officials on public property by authority of law. The piling of lumber on the public property constituted a nuisance. 2 *Dillon, Mun. Corp.* (4 Ed.), secs. 660, 680; *State v. Campbell*, 80 Mo. App. 110; *Seibert v. Railroad*, 188 Mo. 657; *Loth v. Theater Co.*, 197 Mo. 328; 1 *Dillon, Mun. Corp.* (4 Ed.), secs. 95, 374, note 3; Charter, art. 3, sec. 26, cl. 6; *Compton v. Bridge Co.*, 62 Tex. 715; *Williams v. St. Louis*, 120 Mo. 402. (6) Where the purported possession on which the action of forcible entry and detainer is based was obtained for the purpose of imposing on another party the burden of bringing an action of ejectment, as in the present case, then the possession is not such as will support the action of forcible entry and detainer. *DeGraw v. Prior*, 60 Mo. 56; *Underwood v. Caruthersville*, 146 Mo. App. 288. (7) While it is true that title is not in issue in a forcible entry and detainer suit, yet deeds or other evidence of title are admissible to show the character, nature or extent of the possession in controversy. Therefore, the wharf deed as well as the city ordinances enacted in 1852 and in 1864, respectively, were competent evidence. They were also competent for the purpose of showing that the property in question was part of the public

wharf of the city of St. Louis. 19 Cyc., 1165; Moore v. Shoop, 123 Mo. App. 407.

LAMM, J.—Forcible entry and detainer. Plaintiff, cast below on a trial to the merits, appeals. Plaintiff corporation owned a block of ground on Dock street abutting on the public wharf in North St. Louis. On said block was situate its manufacturing plant. If a certain two of the parallel lines of that block were produced to the Mississippi River, they include a part of said wharf. On a part of the land lying between said lines so produced, plaintiff had for some time piled lumber for use in its manufacturing business. It seems this lumber, of the value of, say, \$40,000, was piled there by leave of the Hafner heirs, who, in turn, as owners of the stock in plaintiff corporation, controlled the latter.

At a certain time in the late summer and fall of 1910, defendant city, acting through its mayor, its harbor and wharf commissioner and its law department, served notice on plaintiff to remove said lumber—this by virtue of certain ordinances. On failure of plaintiff to do so (which happened) the city marshal was ordered to remove the same. Thereupon that officer, in a writing aptly referring by description to the part of the wharf so obstructed, to the municipal code and pertinent ordinances, gave plaintiff notice to remove the lumber piles within ten days, or in default that he (the marshal) would remove them. It seems this notice had been preceded by negotiations, for, say, two months, looking to the clearing away of the alleged obstructions and that when the marshal finally served notice, plaintiff asked to be further notified of the exact day the officer would appear on the scene and began removing the lumber—this evidently for the purpose of entering a verbal protest, and thereby laying a supposed foundation for projected litigation. Accordingly the marshal, by word of mouth, gave plaintiff notice

when he appeared with his men and teams, and then and there plaintiff protested against his contemplated action.

Going back a little, it will do to say that in the prior negotiations between the city officers and plaintiff, the latter asserted "color of title" and the right to possession. Moreover, as the ordinance of the city provided for the seizure and sale of material wrongfully stored on wharf property and constituting an obstruction, plaintiff, having a large amount of lumber in jeopardy, concluded not to put all its eggs in one basket. Accordingly, immediately before the marshal came on the scene to remove the lumber it seized time by the forelock and removed substantially all of any value. It left a few "top boards" and some stakes used in piling, and we get the impression these were left for the very purpose of testing plaintiff's rights without, at the selfsame stroke, putting too much at hazard. The marshal removed the lumber so left and after due notice sold it for the rise of \$50 on due advertisement at public auction. One of plaintiff's officers estimated the real value of the lumber so sold at the rise of \$300. Having cleared off the wharf, the marshal left the premises vacant and so they are to this day. On the same day the marshal began removing the lumber, or presently and while it was in the course of being removed, plaintiff began this action in forcible entry and detainer before a justice of the peace, alleging it was "lawfully possessed" of the premises, describing them, and that on the 21st day of November, 1910, while it was so "in lawful possession thereof, defendant city forcibly entered into the possession of the premises and forcibly detains possession from plaintiff to its damage," etc., wherefore plaintiff prays "judgment of restitution" and for its damages including the value of the monthly rents and profits, etc.

The cause was taken by *certiorari* to the circuit court, and there defendant filed an answer admitting it was a municipal corporation, denying every other allegation in the complaint and its guilt in the manner and form charged. Defendant then, by affirmative allegations, asserted its charter power to establish, open and regulate public wharfs; that in pursuance of that power, by proper ordinances, it had established such wharfs and was in control and possession of them; that the property described in the complaint was part and parcel of the property established by defendant as a public wharf and of which defendant had had possession for fifty years prior to the suit as part of its said wharf. The answer next went on in detail to set up the power of defendant city to prevent and abate nuisances by ordinances, to remove all obstructions and encumbrances from public property and specially pleaded certain ordinances making persons guilty of a misdemeanor who place upon any wharf any nuisance, encumbrance or impediment, requiring the same to be removed by such parties and providing that if they are not removed within the time designated by a named officer, to-wit, the harbor and wharf commissioner, such parties shall, as said, be guilty of a misdemeanor. Pleading also another ordinance leveled against the occupancy of and encroachment upon or obstruction of public wharfs, and providing for the removal of such obstructions, averring that plaintiff unlawfully placed upon a certain part of defendant's public wharf, to-wit, the premises described in the complaint, obstructions consisting of piles of lumber and thereby creating a nuisance upon such public wharf, to the hindrance and detriment of the public in its use of the same. The answer went on to justify the removal of the lumber by averring that defendant acted in strict compliance with the methods prescribed in the last-mentioned ordinance, number 25363, averring that complainant could not have any lawful right or use of said public wharf

or any lawful possession thereof as against defendant, but that it had, in so obstructing and encumbering said public wharf, become and was a wrongdoer and as such was subject to prosecution and conviction as a misdemeanor.

On pleadings thus outlined, the cause was tried without a jury. Sufficiently more of the record to understandingly dispose of points we deem material, will appear in connection with rulings on such points.

We state questions in our own way.

I. *Of rulings on evidence.*

(a) In making its case, plaintiff introduced a deed dated in 1881 from Branch and Gartside to Joseph Hafner (said Joseph being the ancestor of the Hafner heirs hereinbefore referred to) to the *locus in quo* and other land; and another from one Butler, trustee, to said Hafner, dated in 1879. This latter deed evidenced the foreclosure of a deed of trust given by two persons named Glasgow. It conveyed property (we take to be the block on which plaintiff's plant is situate) described as running to the wharf, together with "all accretions to the same belonging, east thereof," which quoted clause covers the *locus in quo*. These deeds were offered and admitted to show what plaintiff's counsel called at the time "possession" and "color of title," "not the right to this property." Said deeds with plats, notices referred to hereinbefore, and oral evidence relating to the permission given by the Hafner heirs to plaintiff corporation to pile lumber on the premises, and the actual piling of such lumber thereon and the removal of the same—all as hereinbefore set forth—in a nutshell constitute the facts upon which plaintiff relied for recovery. It will be of interest to note, as presently shown, that defendant itself holds under the Glasgows and others.

When defendant came to make its own case, it offered a deed dated in January, 1853, executed by, to-

wit: "Mary L. Tyler, H. F. Christy, Susan Preston Christy, Wm. A. Pendleton, M. A. Pendleton, Thos. H. West, Martha West, William G. Ewing, John Biddle, By Louis G. Picot, his atty. in fact; J. T. Sweringen, M. J. Sweringen, L. A. Benoist, G. W. Goode, Francis S. M. Goode, Wm. H. Glasgow, Mary F. Glasgow, D. D. Mitchel, Martha E. Mitchell, M. N. Taylor, Edwd. C. Wills, Sam'l B. Churchill, Amelia C. Churchill, Orleans C. Schaumburg, Martha A. Willis, Harriet M. Dean, Thos. A. Wright, John R. Shepley, V. Graham, C. Graham, Ch. Chambers, James Chambers, Mary Harney, L. M. Kennett, mayor of the city of St. Louis; William Waddingham, Louis V. Bogy, Jno. Maguire, H. Von Puhl, L. K. Barret, William F. Wright, E. F. Wright, Walker R. Carter, Rebecca A. Carter, Walker R. Carter, executors of H. M. Shreve, deceased; Thomas L. Snead, Harriet V. Snead, Dan'l D. Page."

These grantors describe themselves as owners and part owners of the real estate conveyed; said deed is known as "the dedication deed of 1853." It conveyed to the city of St. Louis the *locus in quo*, together with much other real property, for the purpose of a "public wharf for said city."

We may as well state at this point that this dedication deed, as a foundation of the city's right to its wharf, has been attacked from various angles by some of the granting parties (for instance, the Sweringens) and their descendants, grantees, and subgrantees, but has been uniformly sustained against all attacks as a valid, operative instrument for the wharf purpose blazoned forth therein in the following cases, among others: City of St. Louis v. Wiggins Ferry Co., 88 Mo. 615; Sweringen v. St. Louis, 151 Mo. 348; Hafner v. St. Louis, 161 Mo. 34; Troll v. City of St. Louis, 257 Mo. 626, and Troll v. City of St. Louis, 257 Mo. 765. These Troll cases in some of their phases involve the same deed of dedication and the same wharf.

The Hafner case, *supra*, was ejectment for the land involved here. In that case the plaintiffs were the very heirs of Hafner under whom plaintiff corporation now claims a permissive license to pile lumber, and therein the city filed an equitable answer. The issues being found for the city in that case, the plaintiff in the instant case confronts the proposition of *res adjudicata*, despite the fact the form of the former action was ejectment. [Preston v. Rickets, 91 Mo. 320.]

When defendant offered its said dedication deed the record shows as follows:

“Objected to by complainant as incompetent and immaterial and on the ground that the grantors had no title to the premises in suit and title is not an issue in this case.

“The Court: The objection is overruled on the ground that it is offered, as I understand it, solely for the purpose of showing that the property in question is part of the public wharf.”

It will be observed no exception was taken to this ruling.

A main part of plaintiff's brief is devoted to discussing the general rule of law that in actions under the forcible-entry-and-detainer statute title is not an issue. That generalization must be taken in the sense that title is not tried out as a determinative factor, and with the observation that it, like other general rules, has its modifications made necessary to meet the full ends of justice in each case. Reference thereto will be made presently. Plaintiff complains of the ruling admitting said deed. For present purposes it is sufficient to say that on the record quoted, *supra*, as said, no exception was saved to the ruling of the court on the objection; hence the trite doctrine applies that no assignment of error can be predicated on appeal of such objection. On appeal only exceptions ruled below concern us. [R. S. 1909, sec. 2081.] Accordingly the point falls out of the case, and is disallowed to plaintiff. This

ruling is somewhat technical, but is softened to us for that plaintiff itself read its own deeds into the record and should not blow hot and blow cold on the same proposition. [Stumpe v. Kopp, 201 Mo. l. c. 418-9.]

(b) Complaint is made that the court permitted defendant city, over plaintiff's objection, to introduce ordinances relating to establishing wharfs, etc., to-wit, ordinance No. 2932 and ordinance No. 5403. It will not be necessary to set them forth further than to say they looked to the improvement of the wharfs so established and under them the one in question was improved in part and used as a wharf.

To the offer of those ordinances, the record shows the following stock objection: "Objected to by complainant as *incompetent, irrelevant and immaterial.*" We think the time has come when for the convenience of apt designation this stereotyped objection may, without lowering the dignity of our case, be termed the 3-i's. On a similar ground we may say these "i's," like the mere germinating eyes of the potato, see not, and are of little or no sensible use in the administration of justice. We have been so lately over the philosophy of the matter in *State ex rel. v. Diemer*, 255 Mo. l. c. 346 et seq., that new exposition is excessive exposition. We can add nothing worth while to what is said in that case. Whenever called on to consider such unreasoned and elusively expansive form of objection this court has taken pains to give reasons why it is generally unavailing as an assignment of error when overruled *nisi*. We disallow the point to plaintiff.

(c) For the purpose of showing the occupancy of the wharf on the part of the city, and the character of its possession, certain of its acts in dealing with what was deemed public property were admitted; for instance, certain leases and a certain ordinance. This evidence was challenged as "irrelevant and immaterial." The exception saved to the court's ruling on

such objection cannot be considered. This for reasons given in paragraph *b*, *supra*.

(d) For like reasons the same disposition must be made of exceptions saved by plaintiff to introducing a letter from Harbor and Wharf Commissioner Whyte, of date August 10, 1910, and an order from Acting Mayor Rombauer to the marshal, of date August 1, 1910.

(e) Defendant offered an ordinance, No. 25653, and an exception was saved to overruling an objection to the same. We copy enough of the record to show the scope of the objection, thus:

“Objected to by complainant as incompetent, irrelevant and immaterial.

“The Court: Your objection goes to the validity of all the proceedings by the city, as I understand you?

“Complainant’s Counsel: It is in contravention of all the laws of the State and therefore void. In contravention of the law that no person shall enter upon the land of another; and this property is real estate. We further object on the ground that the ordinance is unconstitutional, because it is forbidden by the Constitution to enact a law except in pursuance of the Constitution, and laws of the State.”

Attending to that record, we observe: The first ground of objection has been already ruled upon. The last is of no efficacy because it is too general and vague. In appealing to the Constitution and laws to persuade a ruling on the admission of evidence, it will not do to make a wholesale appeal to the whole body of the Constitution and the whole body of the law. [*Vide, arguendo*, *Bragg v. Met. St. Ry. Co.*, 192 Mo. l. c. 345.] But counsel must put their finger on the specific provision of the Constitution and the specific law that is violated by the ordinance objected to. We have uniformly ruled as indicated in refusing to take cognizance of constitutional points thus vaguely outlined below in

general objections to evidence and in motions for new trials, and on questions of jurisdiction. The objection, to be of practical use, should be certain and specific.

(f) Defendant offered in evidence the files and record of the case of Hafner et al. v. St. Louis. (*Nota bene*: This was the ejectment suit tried in the circuit court of St. Louis on an equitable answer, decided against those persons under whom the present plaintiff claims a permissive right, and affirmed here on appeal as hereinbefore set forth.) There are grounds of objection to the introduction of these files and records we have already disposed of. Premitting those, we come to the following additional ground: "Further objected to on the ground that this is a forcible entry and detainer suit, and the defendant now seeks to raise an inquiry as to the title—to go into the question of title—and seeks to establish title by this offer."

Attending to that objection, we say this: It was admitted in open court that the deed of dedication (the 1853 deed) placed the property in dispute within the land descriptions of that deed and fixed the western boundary of the wharf along the west line of said property. There is undisputed evidence that the city for two generations or so had possession—a possession it held against hostile attacks from any quarter, as indicated in cases cited, *supra*. So, the instant case runs on the undisputed record that while the city had not improved the entire wharf tract as a wharf, yet it had improved (and for half a century used) a public wharf running longitudinally along its eastern part next to the Mississippi River, leaving a ribbon of it on the west unimproved as yet. The record carries abundant proof of the further fact that the trial court time after time disavowed any intention to try the question of title between plaintiff and defendant, as title, but admitted the dedication deed, ordinances, various leases, and acts of the city (not on the question of title, but) to characterize the city's possession as that of a public

wharf for the benefit of all persons needing one for shipping by water. Now, "What will constitute a possession must depend on circumstances." [Eads v. Wooldridge, 27 Mo. l. c. 254.] "The purposes," says SCOTT, J., in that case, "for which a tenement is used has its influence in ascertaining the acts and conduct which will determine whether or not there is a possession of it." The proof tendered here constituted, when properly limited, the "circumstances." Accordingly, when the above objection was made to the files and record in the Hafner ejectment case, defendant at once limited the object of its offer of evidence in a way to subserve a proper purpose and to exclude it as a tender on an issue of title, as title, thus:

"Defendant's Counsel: The files in this case are offered for the purpose of showing that the dedication deed offered in evidence by the city and the two deeds offered by the plaintiff were passed upon and construed by the Supreme Court; for the purpose of showing the character of the possession of the plaintiff of the land in suit."

On that limited offer the court overruled the objection, and we think rightly so. We will recur to the subject-matter of "title" under another head presently; for the present we will say this: It would seem an essential prerequisite in doing justice between plaintiff and defendant from a standpoint of common sense to first ascertain whether the *locus in quo* was a part of the public wharf, the public commons of the city for wharfage purposes. It would be quite out of the question to deal intelligently with the matter if that fact were left dark. There is no indication in the case that the court used the evidence for an alleged improper purpose, to-wit, by making it the basis of an improper finding; for instance, to make the case turn only on title. The evidence did plaintiff no harm, as we see it, hence the point is disallowed.

Material complaints relating to errors in the introduction of evidence having been sufficiently disposed of, we confront a group of questions, given by us a composite head, thus:

II. *Of the merits (and herein of the instructions).*

(a) It may be taken as acceptable doctrine that a public wharf on a navigable stream connected, as here, with public streets and in a sense an extension of such streets, is in the eye of the law a public highway. Its character is similar. The right to the common use of it in the public is similar, and in a very just sense, the right of the city in and its duty toward it are akin to its rights and duties toward its public streets. The authorities cited by respondent's counsel broadly sustain these propositions.

In this view of it, it becomes important to notice that this corporate plaintiff by this suit does not assert a right to use the public wharf tract as other citizens are entitled to use it, to-wit, for purposes of commercial traffic. *Contra*, it asserts a dominant and preclusive use to part of it. It brings a suit not to assert the right to a common public use, but for the purpose of being put back into an exclusive possession of the *locus in quo*. It stands, then, in the same predicament as an individual would be in who desired the aid of the law to put him back in control and possession of an appreciable part of a public street—a claim inviting jealous scrutiny on its very face.

If in analyzing and defining the term "law" from one angle, Mr. Justice HOLMES was correct in saying it was "a statement of the circumstances in which the public force will be brought to bear on men through the courts,"—we say if that be correct, then the application of force through the courts to put plaintiff into exclusive possession of a part and parcel of a tract dedicated to a public wharf should be judicially eyed askance or, better still, well looked to in advance.

(b) Something is said, *arguendo*, to the effect that the city, while it improved part of the dedicated wharf tract, did not improve the part in dispute; hence by that token some virtue goes out of defendant's case, while an increment of virtue is (by the same token) added to plaintiff's; but it is not worth while to cite authorities to sustain the proposition that defendant city has legislative and ministerial discretions in the particular of wharf improvement. It is not obliged to improve the whole tract in any given period of time, whether such improvement be necessary or not, and whether it have present financial ability to make such improvement or not. The improvement or nonimprovement of the wharf is, then, no concern of plaintiff in this suit, and the fact neither adds to nor subtracts from its rights an iota. Therefore, the case should not be allowed to turn on that inconsequent feature.

(c) Ordinance No. 25365, read into the case by defendant, is too long to copy here. The substance of the material part of it, in small compass, was to provide a workable and common-sense plan for clearing away obstructions on wharfs by compelling guilty parties to remove them, making them guilty of misdemeanors and providing a scheme for summary removal in case such parties fail to act on notice given. As pointed out heretofore, the city removed the lumber culls and sold them under the provisions of that ordinance. Something is said, as we get the run of the argument, to the effect that such disposition of plaintiff's lumber was illegal, and not in accord with due process of law, etc. As to that we say, we have not overlooked the abundant caution whereby plaintiff left enough of the refuse or weather-stained lumber on the ground to mark the point and spot with a pin prick. as it were, so as to save its supposed future rights in contemplated litigation. But that caution must go unrewarded in this case for two reasons, thus:

In the first place, this is not a suit to test out the right to take possession of and sell plaintiff's lumber. No damages on that score are either asked or could be awarded on forcible entry and detainer. If, therefore, plaintiff has a right of action for damages for wrongful conversion of its lumber (on which we say nothing one way or the other) its remedy lies down another road.

In the next place, the instant case does not justify a discussion of the established doctrine of the law allowing municipal corporations to abate nuisances and requiring officials charged with the duty of removing obstructions on wharfs and in public streets to perform that duty. A city would be in hard lines indeed were it to stand to be mulcted in damages to individuals for negligence in that behalf, on one hand, and disarmed of the power to prevent the occurrence of such damages by removing obstructions, on the other. Assuming for the purpose of the case that the *locus* was a public wharf and that the right to remove obstructions, wrongfully there, is akin to the right to remove them from public streets, then the following pronouncement of the Supreme Court of Texas in *Compton v. Waco Bridge Co.*, 62 Tex. 715, asserts sensible doctrine:

"To force the municipal authorities to a suit in the courts to secure the removal of obstructions from the streets, would, to a considerable extent, defeat the objects and purposes contemplated in the creation of municipal governments."

(d) It is argued for appellant that the case was tried throughout on an erroneous theory, to-wit, on the theory of trying title as if it were a case in ejectment, this in the teeth of the statute forbidding an inquiry into the "merits of the title" (R. S. 1909, sec. 7677), but permitting "evidence for proof of rights under derivative titles, provided for by this article," the forcible entry and unlawful detainer statute. [R. S. 1909, sec. 7690.]

In ruling propositions advanced, another statute must not be lost sight of, to-wit, section 7668, *ibid.* That section contemplated that a complainant under the forcible entry statute is bound to make proof "that he was *lawfully* possessed of the premises," and that "the defendant *unlawfully* entered into and detained" the same. It may be conceded that the words "lawfully possessed" are used in a restrictive sense, to-wit, in the sense of meaning *peaceable* possession. [Krevet v. Meyer, 24 Mo. l. c. 110; Beeler v. Cardwell, 29 Mo. l. c. 74; Michau v. Walsh, 6 Mo. l. c. 350.] But there is still left to be sharply reckoned with, the word "peaceable." That word is a broad and flexible one in meaning and takes on color from the facts. Does it mean, for example, that if I return to my home in the nighttime after a temporary absence and find a burglar or other trespasser in what he chooses to call complete and quiet possession that *his* possession is peaceable and that I am forced to an action of ejectment to get in? Suppose B, the domestic servant of A, locks the outside door on A of a night, must A go to law about it? In other words, is a *tortious* possession a "peaceable" one within the purview of that section? Take another inquiry step. The gist of the action being an illegal use of force by defendant in making its entry on the premises, and the object of the statute being to keep the peace and keep persons from taking the law into their own hands, can a municipal corporation in the exercise of its charter and ordinance right to remove obstructions from public wharfs and streets and thereby abate nuisances, be brought within the purview of the statute in so doing?

It is not amiss to remind ourselves again that defendant did not remove plaintiff from the premises in so far as plaintiff was claiming a right common to all citizens under proper regulation to use a public wharf. To the contrary, plaintiff was left to share in the com-

mon joint use in the wharf as a wharf. All defendant did was to assert the public use and to remove impediments and obstructions standing in the way of that use. We are unable to see that what defendant did was calculated to break the peace, or was any illegal show of force, or that it detains the property unlawfully as against plaintiff.

The premises all in mind, we are of opinion appellant's contention that the court made the case turn on mere *title* is not well made. This because:

(1) In the first place, the court in instructions as well as in rulings on the admission of evidence sedulously guarded itself against doing the very thing appellant now charges it did. We will not swell this opinion by recapitulating those rulings already set forth which, we think, unerringly indicate the trial theory, and a correct one.

(2) In the next place, on the facts of this record plaintiff did not make out its case on the issue of being "lawfully possessed." Observe, defendant's possession of the tract as a public wharf was fortified by a solemn adjudication of this court to that effect and against the heirs of Hafner, who subsequently created plaintiff corporation and then licensed it to pile lumber on the city's wharf ground. Take a case: Suppose plaintiff in spite of the cited judgment in ejectment, rendered on an equitable answer, had taken possession of part of the wharf by force and arms after mandate went down settling the matter for all time, would that act constitute a lawful entry to result in lawful possession? If not, is the act of inching over surreptitiously or furtively and unknown to the owner and without any show of force on a small unused part of a great public wharf a fact constituting a lawful entry to result in lawful possession under the definitions of lawful possession already announced? I trow not. [*Vide* cases *supra*, and an interesting discussion by our Brother WILLIAMS in *Abeles v. Pillman*, 261 Mo.

359.] To so hold would be the same as saying that the fox, who takes his prey secretly by adroit cunning and indirection when the farmer is not by or looking, is entitled to more respect than the hungry lion, who takes his in open day by use of sheer might, main, tooth and claw, and terror, unafraid of the face of man.

Speaking guardedly and strictly to the facts of this record, we are of opinion that such a tortious possession as we have here is not the kind of possession protected by the statute of forcible entry and detainer. The possession must be something more than a sham. At an early day Judge NAPTON in *Michau v. Walsh*, supra, made the following apposite observations:

“I take it that nothing more is meant by the term lawful, in this section, than peaceable or quiet possession, contradistinguished from possession which is not merely constructively tortious, but actually so. Such, I think, would be the character of the possession of the man, who, in my temporary absence, should get possession of my house. It would be tortious, and, on my return, I might eject him, without subjecting myself to an action of forcible entry and detainer.”

Moreover, it seems to us that the show of force in the instant case by the city in removing the lumber obstructing the public wharf was not the kind of violence and force coming within the purview of the statute and the mischief denounced. Attend to that view of it. In *Iron Mountain & Helena R. R. v. Johnson*, 119 U. S. l. c. 611, the philosophy of the matter is thus set forth by Mr. Justice MILLER:

“The general purpose of these statutes is, that, not regarding the actual condition of the title to the property, where any person is in the peaceable and quiet possession of it, he shall not be turned out by the strong hand, by force, by violence, or by terror. The party so using force and acquiring possession may have the superior title or may have the better right to the present possession, but the policy of the law in this

class of cases is to prevent disturbances of the public peace, to forbid any person righting himself in a case of that kind by his own hand and by violence, and to require that the party who has in this manner obtained possession shall restore it to the party from whom it has been so obtained; and, then, when the parties are in *statu quo*, or in the same position as they were before the use of violence, the party out of possession must resort to legal means to obtain his possession, as he should have done in the first instance. This is the philosophy which lies at the foundation of all these actions of forcible entry and detainer."

Speaking to the question of force, a standard work puts the matter in this form (19 Cyc. 1117): "The force involved in the offense of forcible entry is private force unlawfully exerted, and the public force of the State lawfully exercised cannot be the means of a wrongful entry."

We take care to say that we shall not hold that a municipal corporation, under any circumstances to be put or imagined, could not be guilty of forcible entry and detainer; but, under the circumstances disclosed by this record, we have no hesitancy in holding that the proposition quoted from Cyc., *supra*, is a sound and applicable one.

Furthermore, in this connection it is well to bear in mind (not as a controlling but as an illuminating fact) that no possession by plaintiff of the public wharf, however long continued, could ripen into title under the Statute of Limitations. Section 1886, Revised Statutes 1909, reads:

"Nothing contained in any Statute of Limitation shall extend to any lands given, granted, sequestered or appropriated to any public, pious or charitable use, or to any lands belonging to this State."

We have held that statute under recent exposition. [Dudley v. Clark, 255 Mo. l. c. 583 et seq.] That case may be consulted by those possessed of prying

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minds. We leave the matter with the remark that to hold plaintiff's possession, not only taken in the teeth of our judgment, but taken under circumstances that could never create title, a sham possession, cannot be out of the way.

(e) It will not be necessary to reproduce instructions. Appellant assigns error in the giving of two for respondent, but an examination shows them to be drawn on theories of the law announced as correct in this opinion. Such being the case, there is nothing else to do except affirm the judgment. Accordingly, let that be done. It is so ordered. All concur, *Bond, J.*, in result.

C. H. ALBERS, Appellant, v. NAT L. MOFFITT et al.; MERCHANTS EXCHANGE BANK OF ST. LOUIS, Appellant.

Division One, December 19, 1914.

1. **APPELLATE JURISDICTION: Cross Appeals.** Where there are cross-appeals from the same judgment to a Court of Appeals, if either is transferable to the Supreme Court both are.
2. ———: **Injunction: No Damages.** An appeal by a merchants' exchange from a judgment enjoining it from expelling plaintiff from membership therein, wherein the petition does not show any legal basis for estimating the value of the injunction, is to the proper court of appeals, for it cannot be determined therefrom that any amount of money is in dispute.
3. ———: **Accounting: No Data.** A petition for an accounting, which gives no basis for a return of a definite sum of money and does not state in any way how much defendant is indebted to plaintiff, does not vest the Supreme Court with appellate jurisdiction.

Appeal from St. Louis City Circuit Court.—*Hon. O'Neil Ryan, Judge.*

TRANSFERRED TO ST. LOUIS COURT OF APPEALS.

Barclay, Shields & Fauntleroy for plaintiff.

*R. F. Walker, Rassieur, Schnurmacher & Rassieur,
Boyle & Priest* and *T. E. Francis* for defendants.

STATEMENT.

There were two appeals in this case, both primarily to the St. Louis Court of Appeals. One was taken by the Merchants Exchange from that portion of a decree of the trial court which enjoined it from enforcing a resolution suspending plaintiff, C. H. Albers, for a definite period from any and all privileges of the Board of Trade conducted by the Merchants Exchange. The other appeal was taken by said Albers from that portion of the same decree of the trial court which dismissed his suit as to the individual defendants. These two cross-appeals were pending in the St. Louis Court of Appeals, and one of them, that taken by the Merchants Exchange, was disposed of in Missouri Appeals, vol. 140, p. 446. The other appeal, as is shown by a file mark on the record before us, was on March 30, 1909, transferred to this court, on the motion of the respondents, for the following reason: "because the amount involved is more than forty-five hundred dollars." This latter appeal was argued and submitted in this court on the 19th day of October, 1914 (at its October Term). Other phases of this controversy have been before this court: *C. H. Albers Com. Co. v. Spencer*, 205 Mo. 105; *Ibid.*, 245 Mo. 368.

The substance of the petition culminating in the judgment from which these two cross-appeals were taken is that C. H. Albers, plaintiff, on behalf of the Albers Commission Company, of which he was president, entered into contract with the defendant, Moffitt, on behalf of the Commission Company, of which he was likewise president, for the sale for future delivery of certain grain, such contracts to mature and delivery to

be made before the 31st of December, 1903; that to secure his engagement, about twenty thousand dollars was put up with said purchaser as a margin; that thereafter said purchaser formed a secret agreement with his co-defendants, Spencer & Milliken, to "forestall the market in wheat in St. Louis," to the end that said Spencer & Milliken should be able to dictate the price of wheat in transactions upon the Board of Trade; that for this purpose the grain contracts executed by plaintiff had been transferred to said Spencer & Milliken, in order to assist them in their conspiracy to corner the wheat market; that thereafter, to-wit, March, 1904, the said Hubbard & Moffitt Commission Company returned to plaintiff the sum of \$1790.25, being the amount of difference between the contract price of the grain which plaintiff had agreed to sell them, and the "fictitious price of 92c per bushel," which the defendants (Spencer & Milliken and Hubbard & Moffitt Commission Company) by means of their corner of the market had created and fixed for the price of said grain on and before December 31, 1903; that when this was done, plaintiff refused to return to said Hubbard & Moffitt the reciprocal paper memoranda evidencing the original contracts of purchase of said grain executed at the time by the said Moffitt & Company; that for such refusal the defendant, Merchants Exchange, passed a resolution suspending him from the privileges of membership in that body; that said resolution was invalid. The prayer of plaintiff's petition is to-wit:

"Wherefore, the premises considered, plaintiff prays the court to enjoin and restrain said Merchants Exchange of St. Louis from further enforcing said resolution or order of suspension of plaintiff and that said order or resolution be cancelled and decreed to be void, and that the said contracts between the C. H. Albers Commission Company and the Hubbard & Moffitt Commission Company be cancelled and declared void, and that said plaintiff *have accounting of dam-*

ages sustained by him in this behalf (so far as the same may be ascertained), including therein damages for the oppressive, fraudulent and unlawful and wrongful acts aforesaid of said defendants and each of them, and that plaintiff recover *such damages* aforesaid as may be so found to be *justly due to him* by each of said defendants respectively, and have such other and further relief as may be just, and that plaintiff have a temporary restraining order to the effect first above prayed, pending the litigation and until the further order of this court, upon such terms as may be just and equitable.”

All the defendants named in this petition were made parties by personal service. The defendant, Merchants Exchange, duly answered. The other defendants, not having answered within a year after said service, a default was taken against them. The case came on for trial upon the petition, the default, the answer of the Merchants Exchange, the evidence taken and an agreement as to certain facts, whereupon the trial court decreed a temporary injunction hitherto awarded by him against the Merchants Exchange to be perpetual, and found in favor of the defaulting defendants on the other issues presented by the petition and dismissed plaintiff's petition as to them. Whereafter, the two cross-appeals were taken as above stated.

OPINION.

I.

BOND, J. (After stating the facts as above).—After a careful consideration of the record and briefs and hearing the oral argument in this case, we have reached the conclusion that no jurisdiction of this appeal was vested in us by the order of the St. Louis Court of Appeals transferring this cause upon the assumption that it involved “an amount in dispute” beyond the jurisdiction of that court. At that time the pecuniary limit of the jurisdiction of that court was

forty-five hundred dollars. At the time the cause was submitted in this court, the pecuniary limit of the jurisdiction of that court had been raised to seventy-five hundred dollars, exclusive of cost. The question to be determined by us in ascertaining our jurisdiction is whether or not at the time of the submission of this cause the "amount in dispute" therein exceeded seventy-five hundred dollars. Before dealing with that question, it is well to say that doubtless the St. Louis Court of Appeals would not have transferred a *parcel* of this case presented by the cross-appeal of plaintiff from the same judgment from which the Merchants Exchange had also taken an appeal to that court, if its attention had been called to the pendency of the two cross-appeals, for in that event if one was transferable the other should also have been transferred at the same time. [Keller v. Summers, 262 Mo. 324.]

We think it clear, however, that neither of the appeals taken in this cause presented any question of amount which debarred the St. Louis Court of Appeals from taking cognizance of them when said appeals were duly lodged therein.

First: The appeal from an adverse ruling of the injunctive "prong" of this case which the Merchants Exchange took to the St. Louis Court of Appeals, clearly did not present any amount in dispute whatever, for the petition did not show any "legal basis for estimating the value of the injunction." In such cases we have recently ruled after review of the authorities that an appeal must be taken to the proper Court of Appeals. [Foundry & Mfg. Co. v. Moulders' Union, 251 Mo. 448.]

Second: As to so much of plaintiff's petition as prayed for an *accounting* against the individual defendants, and for a cancellation of the selling contracts executed to them by plaintiff, there is nothing in the petition or in the record which discloses that plaintiff sought to recover any definite sum whatever. The pe-

tition wholly fails to state what was the market value of the grain contracted to be sold at the time of the maturity of the contracts. It does allege that 92c per bushel was an extortionate and fictitious value, but it fails to show to what extent it was in excess of the real or market value of the product at that time. Hence, it presents no data whatever for estimating the amount which might be due plaintiff if it were adjudged that he should only be liable for the market value of the grain for non-delivery. There is no more definiteness or certainty on this point than if the petition had prayed in general terms for an accounting on the part of defendants without stating in any way how much they were indebted to him, and in effect that is what it did. For aught that appears in the petition, or in the record, it may turn out upon an accounting that defendants were not indebted to plaintiff in any substantial sum. In a case handed down at the last opinion day a similar question was presented, and after a careful review of the authorities and a full analysis of the petition and record in that case there were found no basis or facts from which the court, with reasonable certainty, could arrive at the conclusion that more than \$7500 was involved, and the cause was therefore remanded to the St. Louis Court of Appeals. [Bowles v. Troll, 262 Mo. 377.]

In the case at bar, the only dispute can be as to whether or not the plaintiff is entitled to a return of a greater part of the amount advanced by him as margins (about \$20,000) than was voluntarily repaid to him. He has furnished us no estimate or allegation of what additional sum he thinks should be returned, nor is there in the record any basis for a necessary deduction that a larger amount than \$7500 is claimed or would be awarded to the plaintiff on an accounting in this cause.

For the foregoing reasons, it is apparent that no jurisdiction was vested in this court by the act of the

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St. Louis Court of Appeals in transferring this cross-appeal.

The case is, therefore, re-transferred to the St. Louis Court of Appeals. It is so ordered. All concur.

A. A. THUMMEL, Appellant, v. JOHN T. SURPLUS.

Division One, December 19, 1914.

1. **ASSAULT AND BATTERY: Self-defense: Instructions: Error**
Invited by Complainant. A plaintiff in an assault case who asked and was given instructions submitting the issue of self-defense, will not be heard to contend upon appeal that that issue was wrongfully injected into the trial.
2. ———: ———: ———: **Threatening Language: Evidence.**
Where, in an action for assault and battery, the defendant testified that when he alighted at the plaintiff's gate, after saying he had come to dig potatoes, the plaintiff "stepped right up and said, 'No you won't dig them,'" and that then they both drew back and struck at each other and the plaintiff went down, the trial court did not err in instructing the jury to inquire whether the plaintiff used violent and threatening language toward the defendant, and in an angry and threatening manner and within striking distance drew back his hand to strike him. In judging whether the language was violent and threatening the jury were not confined to the tone of voice in which the words were uttered, but could take into consideration the acts and gestures accompanying it and even its culmination in immediate violence, the real question being whether it gave the defendant reasonable ground to believe, and he did believe, that the plaintiff intended to do him bodily harm.

Appeal from Nodaway Circuit Court.—*Hon. William C. Ellison*, Judge.

AFFIRMED.

Cook, Cummins & Dawson for appellant.

(1) The court erred in giving defendant's instruction 1. This instruction is error, for it told the

jury that the "Plaintiff approached the defendant and used violent and threatening language and in an angry and threatening manner," and there was no evidence that the plaintiff used any violent language or threatening language, or was even angry. *Felver v. Railroad*, 216 Mo. 195; *Dee v. Nachbar*, 207 Mo. 680. (2) The court erred in giving defendant's instruction 2. This record shows there was no self-defense in this case. Defendant went upon plaintiff's premises, and, according to his own testimony, voluntarily entered into the difficulty, hence he cannot now avail himself of the plea of self-defense. *State v. Walker*, 196 Mo. 73; *Johnson v. Dailey*, 136 Mo. App. 593; *State v. Gamble*, 119 Mo. 427; *Shellabarger v. Morris*, 115 Mo. App. 566.

Shinabarger, Blagg & Ellison for respondent.

(1) The acts and conduct of the plaintiff when he spoke the words "No, you won't dig them," as testified to by the defendant, clearly indicated that he was angry, and the accompanying gesture when he drew back his arm to strike made them imply a threat. To say the least, if the evidence of the defendant did not fully establish that the plaintiff spoke the words in an angry and threatening manner, it was sufficient to support an inference that they were so spoken. If it did, the defendant was entitled to the benefit of that inference and had the right to have the jury pass upon it under an appropriate instruction—and the form of the instruction is not questioned by appellant. *Linderman v. Carmin*, 255 Mo. 62. (2) It is hardly consistent for appellant to complain that the issue of self-defense was submitted to the jury when he himself submitted two instructions on the same issue. His instructions 2 and 3 were on the question of self-defense. *Railroad v. Kemper*, 256 Mo. 279; *Lange v. Railroad*, 208 Mo. 475; *Kinlen v. Met. St. Ry.*, 216 Mo. 166.

Thummel v. Surplus.

BROWN, C.— Suit for damages from assault and battery committed July 22, 1907. The defense pleaded was *son assault demesne*. The evidence showed that the plaintiff and defendant were both farmers and neighbors living in Nodaway county. In addition to the farm on which he was living the plaintiff had another near by, upon which a woman named Mrs. Jocelyn had been living that summer and had planted a vegetable garden, which contained some potatoes which had attained the esculent age. Mrs. Jocelyn being about to leave this particular field of her activities, Mrs. Surplus, the wife of defendant, negotiated with her for the potatoes, and the week before the trouble, which occurred on Monday, she saw Mr. Thummel, who told her it would be all right for her to buy them, which she did, completing the transaction and paying for them on Saturday. Monday morning she took the notion that she wanted some new potatoes for dinner. Taking a hoe and a sack she got on her horse and rode over to the Thummel farm, a mile away, hitched her horse at the gate, and, with hoe and sack, went into the yard, where Mr. Thummel met her. She told him that she had bought the potatoes on Saturday and had come over to dig some. He told her that he had traded some chickens for them on Friday. The delicate courtesy that may have attended the giving and receiving of all this information does not appear, as Mr. Thummel in his testimony confines himself to an unembellished statement of what he seems to consider the important facts, while Mrs. Surplus did not testify. Mr. Thummel, however, grows more interesting and circumstantial in his relation of the subsequent proceedings. He says Mrs. Surplus went home and that soon afterward Mr. Surplus rode up. He met him at the garden gate and said, "Good morning, Mr. Surplus." The latter did not condescend to answer, but without saying a word got down from his horse, took something from his pocket that he thought was steel or iron,

perhaps a cold chisel or something or other, and struck him over the eye, which knocked him cold the first lick. When he came to, Mr. Beattie and Mr. Antrin, who had been plowing corn in the field near by, had brought some water and were washing his face. He was a sight; "just blood from head to foot." He had nine gashes of different sizes and depth about his head and face, one eye was just about closed, his jaw was hurt, his ribs felt like they were knocked loose from his backbone, the whole hide was knocked off his hand, two teeth were out and another was so badly jarred that he said it was still loose at the trial.

Mr. Surplus's tale of the same occurrence was that his wife came home crying and he got on his horse and went over to get the potatoes. Mr. Thummel met him at the gate. They spoke to each other and Mr. Surplus said he came to get some of the potatoes and asked him why he wouldn't let the woman dig them. Mr. Thummel said that "the old lady owed him and didn't pay him—went off and never paid him the money." Mr. Surplus said he came up after the potatoes and was going to have them—was going to dig them, and got off and took the sack with him. Mr. Thummel stepped right up and said, "No you wouldn't dig them." He then drew back and Mr. Surplus did likewise. They both struck, Mr. Surplus getting in his blow with such force that it knocked Mr. Thummel down. He rose to a sitting posture and Mr. Surplus struck him two or three times more. He declined to swear that he did not kick him, but said he did not think he did. He said he would not have hit Mr. Thummel if the latter had not attempted to strike him first, and that he had nothing in his hands, but used his naked fists.

Mr. Thummel's statement as to the character of his injuries was very much modified by his doctor, while his own character was considerably modified by evidence introduced for that purpose. Mr. Surplus ad-

mitted that after the trouble he had conveyed his farm to a neighbor without consideration to put it beyond the reach of a judgment and that this had afterward been corrected.

As to the details of the difficulty the jury had the testimony of both parties before it. To aid them in its consideration the plaintiff asked the court to give them the following instructions:

"2. The court instructs the jury that if they believe from the evidence that the defendant, on or about the 22nd day of July, 1907, did willfully and wrongfully make an assault upon and beat, strike and bruise the plaintiff, not in a necessary defense of his person, as defined in other instructions, then the jury will find for the plaintiff.

"3. The court instructs the jury that if they shall believe from the evidence that the defendant Surplus provoked and brought on the difficulty with the plaintiff Thummel, then defendant Surplus cannot avail himself of the right of self-defense in order to shield himself from the consequences of beating and assaulting his adversary, no matter how imminent any danger in which he may have found himself during the progress of the fight, and if in this case the jury shall believe from the evidence that the defendant Surplus prepared himself previous to his assault on the plaintiff and brought on the fight in order to wreak his malice, or satisfy any private vengeance upon the plaintiff, then there was no self-defense in this case."

The court gave number two as asked, and modified number three by inserting, after the word Thummel, the words "with intent to do him some bodily harm," giving it as modified. The other instructions asked and given were not pertinent to this inquiry.

The petition asked for \$3000 actual and \$5000 punitive damages. The verdict was for the defendant, and from the judgment entered thereon this appeal is taken by the plaintiff.

The appellant insists in substance that error was committed because (1) there was no self-defense in the case, so that that issue ought not to have been submitted to the jury; and (2) that instruction number one given at the instance of the defendant is erroneous because it submits to the jury as a condition of such defense that "plaintiff approached the defendant and used violent and threatening language toward him" when in fact there is no evidence in the record of the use of violent or threatening language by plaintiff and therefore no evidence on which to base the instruction.

I. While we do not wish to be understood as holding that when a party, in submitting his cause to the jury, is driven to a false issue by erroneous instructions given by the court at the instance of his adversary and against his protest, he may not try to have such issue fairly submitted without waiving his right to object to the erroneous action of the court, it is evident that he ought not to be permitted to take advantage of such error when committed at his own invitation. The appellant had, in this case, before the court had spoken upon the subject, asked it in his request for two distinct instructions to submit the question of self-defense to the jury, instead of asking it, as he might have done were his present position well taken, to find for the plaintiff upon the admitted assault and battery, leaving nothing for their determination except the *quantum* of damages. Having invited this issue he cannot now complain that the defendant accepted it, nor that the court submitted it to the jury. [Rourke v. Railroad, 221 Mo. 46, 62; Smart v. Kansas City, 208 Mo. 162, 204; Barr v. Hays, 172 Mo. App. 591, 600 and cases cited.]

II. The other point made by the appellant is that the court erred in permitting the jury to inquire whether the plaintiff used violent and threatening language toward the defendant, and in an angry and threatening manner and within striking distance drew back his hand to strike him, because there was no evidence of either violent and threatening language or an angry and threatening manner on the part of plaintiff.

**Self-Defense:
Threatening
Language.**

The testimony was that the plaintiff "stepped right up and he said, 'No, you won't dig them.' " He drew back and struck at plaintiff, who says, in his cross-examination, that the blow hit him, although that fact is immaterial in this connection. The jury had both parties before it, heard them relate the circumstances, and might take into consideration their personal appearance as well as their manner in relating so exciting an episode, to aid them in determining the impression its enactment was calculated to produce on the defendant. In judging whether the language was "violent and threatening" they were not confined to the tone or voice in which the words were uttered but could take into consideration the acts and gestures accompanying it, and even its culmination in immediate violence. The real question was whether it gave the defendant reasonable ground to believe, and he did believe, that in striking him the plaintiff intended to do him bodily harm, or simply to give exuberant expression to his good will toward a neighbor.

We see no error in the record which has not been fully concurred in by the plaintiff and accordingly affirm the judgment. *Blair, C.*, concurs.

PER CURIAM.—The foregoing opinion of *BROWN, C.*, is adopted as the opinion of the court. All the judges concur.

HENRY B. SEAMAN, Appellant, v. CLEMENTINA
HELLMAN.

Division One, December 19, 1914.

TAX DEED: Necessary Recitals: Sale by Collector Under Act of March 30, 1872. The Act of March 30, 1872, provided for a special term of the county court in July of each year for the enforcement of tax liens against realty, but also provided that the collector might apply to a subsequent regular term if for any good cause he could not obtain judgment at the special term. *Held*, that a collector's deed reciting proceedings and judgment of sale for taxes at the October term, 1872, without any showing of cause for application to that term, is invalid. [There is, furthermore, no showing in this case, either in the deed or elsewhere that the requisite notice of the day of sale or of the intended application to the October term was given by the collector.]

Appeal from Shannon Circuit Court.—*Hon. W. N. Evans*, Judge.

AFFIRMED.

H. Chouteau Dyer for appellant.

(1) The sale of the property in question was by virtue of a judgment, and not by the collector by virtue of his office. *Wagner's Statutes 1872*, chap. 118, sec. 182, and following. (2) The judgment of the county court is not subject to collateral attack. *Leonard v. Sparks*, 117 Mo. 103; *Yoeman v. Younger*, 83 Mo. 424. (3) The collector's deed in question was sufficient to convey a good title. *Raley v. Guinn*, 76 Mo. 263. (4) The recitation in the deed that "public notice in the manner required by law" was given was sufficient. *Blodgett v. Perry*, 97 Mo. 263; *Ivy v. Yancey*, 129 Mo. 501; *Kane v. McCown*, 55 Mo. 181; *Norton v. Quimby*, 45 Mo. 388; *Littlefield v. Ramsey*, 181 Mo. 613.

J. W. Chilton for respondent.

(1) A tax deed made by the collector based on a judgment rendered at a term subsequent to the July term must show on its face the good cause of such collector for his failure to obtain judgment at the July term, else it is void. *Wagner's Statutes 1872*, secs. 182 and 183; *Laws 1872*, p. 119; *Kinney v. Forsythe*, 96 Mo. 414; *Spurlock v. Dougherty*, 81 Mo. 171. (2) The Revenue Laws of 1872, as well as prior similar enactments, required that a sale of land by a collector for delinquent taxes must have been preceded by notice of such sale, and prescribed the manner of giving such notice. Under these enactments this court has uniformly held that a collector's deed must show on its face the manner in which notice of such intended sale was given by the collector, and that it was not sufficient to simply state that notice of such sale was given "according to law;" and that a deed which did not show on its face the manner of giving notice of such intended sale, was absolutely void as a matter of law. *Moore v. Harris*, 91 Mo. 616; *Lagroue v. Rains*, 48 Mo. 536; *Bingham v. Birmingham*, 103 Mo. 345; *Spurlock v. Allen*, 49 Mo. 178; *Abbott v. Dolling*, 49 Mo. 302; *Yankee v. Thompson*, 51 Mo. 234; *Large v. Fisher*, 49 Mo. 307.

BLAIR, C.—In a suit to quiet the title to the north half of section 23, township 29, range 5, west, in Shannon county, judgment went for defendant, and plaintiff appealed.

The parties agree that the sole question here is whether a collector's deed in evidence is valid. If valid, the judgment is wrong; if invalid, as the circuit court held, the judgment is right and should be affirmed.

The deed in question is dated December 3, 1874, and recites that the taxes on the land above described

(and other lands) "remained due" the county and that "whereas, the collector . . . having on the seventh day of October, 1872, advertised said real estate for sale according to law to pay and satisfy said taxes and penalties; and, whereas, the said taxes and penalties due and unpaid on the 7th day of October, 1872, on which day judgment was rendered according to law by the county court of said county against said real estate for the taxes, interest and costs due thereon; and whereas" the clerk issued his "precept" ordering the property sold, pursuant to which "precept" the collector on November 16, 1872, exposed to sale the tract described and sold the same to Thomas Reynolds on said day, "having previously given at least four weeks' public notice in the manner required by law of said sale of forfeited land," and there having been no redemption thereof within two years, Thomas Reynolds became, etc. Then follow the usual clauses of conveyance by the collector to Reynolds.

The recitations concerning the time of the judgment of the county court and the notice of sale are above set out in full.

The collector proceeded under the Act of March 30, 1872 (Laws 1872, p. 119). That act provided for a *special* term in July of each year for the enforcement of tax liens against realty but also provided that the collector might apply to a subsequent *regular* term *if from any good cause* he could not obtain judgment at the July *special* term. The collector's deed does not show that "any good cause" existed justifying the application made for judgment to the October term, 1872, nor is there anything anywhere in the record supplying that omission. In practically identical circumstances this court in *Kinney v. Forsythe*, 96 Mo. 414, held a collector's deed void. That decision is sound. Reference to it is made for the reasons upon which the ruling was founded and which induce a like conclusion here. Neither does the collector's deed in this case dis-

close that the requisite notice of the day of sale or of the intended application to the October term of the county court (*Moore v. Harris*, 91 Mo. l. c. 620-621) was given by him, and there is no other evidence such notices were given.

In these circumstances the judgment of the county court, if one was rendered, was and is void and the sale was ineffectual and the deed invalid.

The judgment is affirmed. *Brown, C.*, concurs.

PER CURIAM.—The foregoing opinion of BLAIR, C., is adopted as the opinion of the court. All the judges concur.

CITY OF KIRKSVILLE, Appellant, v. ANNIE FERGUSON.

Division One, December 19, 1914.

1. **SIDEWALK: Changing Grade: City of Third Class.** Secs. 9258 to 9275, R. S. 1909, provide in detail every step to be taken in order to assess the damages and benefits that may accrue on account of the change of the grade of a street and the construction of a sidewalk in front of abutting property.
2. ———: **Change in Grade.** The ordinance ordering the sidewalk to be constructed must be read in connection with the one authorizing the assessment of damages and benefits; and while it may simplify matters if the one authorizing the assessment also establishes the grade or proposed change of grade of the sidewalk, yet if the one ordering the sidewalk to be built says that the top surface of the walk to be constructed "shall, when finished, conform to the grade stakes of the city engineer now set and in place," it will not be held that the grade is so uncertain and indefinite as to authorize a dismissal of the proceeding.
3. ———: ———: **Removal of Stakes.** The fact that the stakes fixed by the city engineer to mark the grade of a sidewalk may be removed or destroyed and are not permanent does not authorize the court to rule that the grade of the side-

walk whose top surface is required by the ordinance to "conform when finished with the grade stakes of the city engineer now set and in place" is so indefinite and uncertain that the proceeding brought by the city to construct the sidewalk must be dismissed. The permanency of grade monuments is a matter to be addressed to the city government, and not to the courts; and their purpose is to indicate the grade line to the commissioners who assess the damages and benefits, and to inform the contractors where to place the surface of the sidewalk.

4. ———: Constitutional Questions: Not Passed on Below. Only the rulings of the trial court can be reviewed on appeal. Where the trial court did not try the exceptions filed by the landowner to the commissioners' report, but, upon his motion, dismissed the proceeding on the ground that there were no statutes authorizing it and that the ordinances did not definitely fix the grade of the sidewalk, constitutional questions regarding the damages and benefits to be assessed, for and against whom they should be assessed, and the amount of land that should be embraced in the benefit district, cannot be considered by the Supreme Court on an appeal by the city.

Appeal from Adair Circuit Court.—*Hon. Nat M. Shelton*, Judge.

REVERSED AND REMANDED (*with directions*).

A. Doneghy for appellant.

(1) The court erred in sustaining the motion to quash, for the reason that all of the proceedings are in strict conformity to the requirements of the statute, and the statute is definite and certain. R. S. 1909, secs. 9258 to 9275. (2) The court erred in dismissing the case, for the reason that the proceedings being in strict conformity to the statute it was the duty of the court to proceed by a new inquest of damages. Statutes, *supra*. (3) The court erred in rendering final judgment against the petitioner for the reasons aforesaid. Statutes, *supra*. The grade or elevation at which the walk was to be constructed was not only sufficiently definite but was very accurately designated by reference to the grade stakes then in place, something which

the council could see and data from which the commissioners or contractors could know definitely. The definite character of such designation is attested by the fact that the defendant in her exceptions to the report of the committee informs the court from an observation of the grade stakes, exactly what the new elevation of the walk will be. *McCoy v. Randall*, 222 Mo. 24. Nowhere does the statute applicable to cities of the third class prescribe any particular method of ascertaining or prescribing how the elevation of a sidewalk shall be designated. Nowhere does it say that the walk must be laid to any particular grade or elevation. All of that is left to the wisdom of the local authorities, and it is a well-known fact that few sidewalks are made to conform to the grade established by ordinance for the roadway of the street. Nor does the statute now provide for any plans or specifications. Chap. 84, Art. 4, R. S. 1909, as amended by Laws 1911, pp. 337, 341.

Campbell & Ellison and Higbee & Mills for respondent.

(1) This proceeding is not authorized by law. The second paragraph of Sec. 9254, R. S. 1909, empowers cities by ordinance to construct sidewalks, and to exercise exclusive control over streets and establish grades therefor. The city had no power by ordinance to define a benefit district consisting of two or three lots including defendant's, which should be charged for all the loss or damage that plaintiff's property might sustain by changing the grade of the sidewalk in front of her property. If the damages sustained by defendant came within the provisions of section 9258, that section simply means, as applied to this case, that the damages are to be assessed by three commissioners appointed in the manner provided by section 9262, who should assess her damages. Benefit districts are to be

defined where some proposed public improvement like the establishment of a market place, public park, or public square, is contemplated, that will particularly benefit a portion or district of a city. It certainly never was contemplated that when a city should change the grade of a sidewalk in front of a residence property that a benefit district should be defined, and the damages resulting from such change should be assessed upon such district. If the city may define a district containing two or three lots, then it may declare that all the damages shall be paid by the particular lot in front of which the change of grade has been made, and thus make the lot owner pay all the damage. Where the city takes or damages private property for public use, it, and not the lot owner, or two or three lot owners, must first pay the damages. Sec. 21, Art. 2, Constitution; *Householder v. Kansas City*, 83 Mo. 488; *Hickman v. Kansas City*, 120 Mo. 123. (2) The ordinance does not establish the proposed change of grade. It is indefinite, uncertain, and void. Appellant admits that the ordinance required a change of the grade; the sidewalk in front of defendant's property to be brought to the grade stakes of the city engineer then in place. It does not refer to any profile or specification on file in the office of the city clerk to which reference could be made. A grade can only be established by ordinance. *McCoy v. Randall*, 222 Mo. 40. An ordinance like any law must be certain and definite. It may refer to plans and specifications permanently on file where they can be seen at any time. Stakes are usually set for temporary guidance. To make temporary stakes that are liable to be lost or knocked out at any time, or thrown out by frost, and are at best subject to speedy decay, is not to make a permanent monument or record. The maxim "*Id certum est quod certum reddi potest*" might as well be invoked in favor of an ordinance written in the sand. *Becker v. Washington*, 94 Mo. 375. The establishment of a grade line is the

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exercise of a legislative function. 27 Am. & Eng. Ency. Law (2 Ed.), 122d. (3) This proceeding is an ingenious attempt on the part of the city to charge plaintiff's property with a part at least of the damages that she would sustain by reason of the change of the grade, and is violative of section 21, article 2 of the Constitution, that requires that her damages shall be ascertained by a jury or board of commissioners, and same shall be first paid to her before her property or proprietary rights shall be disturbed. *McElroy v. Kansas City*, 21 Fed. 259; *St. Louis v. Hill*, 116 Mo. 527; *Sheeley v. Railroad*, 94 Mo. 574.

WOODSON, P. J.—This suit was begun in the circuit court of Adair county, by the city of Kirksville, a city of the third class, against the defendants, to have the damages and benefits assessed that might accrue to certain property situate therein, on account of the proposed change of the grade of the sidewalk in front thereof.

After hearing the case in full, the circuit court, on motion of the defendants, dismissed the suit, and the city appealed the cause to the Kansas City Court of Appeals. On motion, that court, because of certain constitutional questions involved, transferred the cause to this court for decision.

The petition, omitting formal parts, was as follows:

“To the Honorable Nat. M. Shelton, Judge of said Court, in Vacation:

“The petitioner herein, the city of Kirksville, respectfully shows that on the 3rd day of July, 1911, the mayor and council of said city did duly pass ordinance numbered 1457 providing for the improvement of a part of the sidewalk portion of Jefferson street, a public highway of said city, by grading the sidewalk portion and constructing a concrete sidewalk along the south side of said street on the north front of a tract

of land described as all of lot eight in block twenty-six original town, now city, of Kirkville, Missouri, except a strip of land twenty-five feet in width off of the east end of said lot eight. And that thereafter on the same date the said mayor and council did duly pass an ordinance numbered 1458 wherein the limits in which private property should be assessed to pay damages by reason of said improvement was defined, a certified copy of both of which said ordinances is filed herewith and hereto annexed. The names of the owners of the several lots, tracts or parcels of land included in said district are as follows, to-wit: John H. Janisch owns lots one and two in block twelve, Railroad Addition to said city, and Annie Ferguson owns a tract of land described as lot eight in block twenty-six original town, now city, of Kirkville, Missouri, except a strip of land twenty-five feet in width off of the east end of said lot eight, and L. F. Poehlman owns all of lot six and a strip of land twenty-five feet in width off of the east end of lot eight in said block twenty-six.

“Wherefore your petitioner prays that three disinterested commissioners, freeholders of Adair county, be appointed to ascertain the compensation to be paid for damages to said property and to apportion the same against the several parcels of land in said benefit district.”

The ordinance fixing the boundaries of the benefit district included the lot of the defendant Ferguson and two lots just west and one lot and a fraction of another just east of hers on the same side of the street.

There was another ordinance passed providing for the construction of a sidewalk upon the grade to be so established, which among other things provided that the top surface of the walk should “conform to the grade stakes of the city engineer now set and in place,” etc.

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All the defendants were served, and the circuit court in vacation, at the time and place contained in the summons, appointed commissioners to assess the damages, etc. The three commissioners met and after viewing the property returned into court their written report under oath, finding that no one would be damaged by the improvement, and thereupon the clerk of the court gave written notice to each of the defendants of the filing of said report and its contents. Prior to the first day of the next term of court the defendant filed exceptions to said report, alleging that the improvement would raise the grade of the sidewalk in front of her property something like twelve inches (which was the fact), and that surface water would be thrown on her premises, and she would be under the necessity of raising her house and would be damaged by the improvement in the sum of five hundred dollars, and she prayed that a new inquiry as to her damages be made.

During the October, 1911, term of court the case came on for hearing and the defendant Ferguson filed a motion to quash or dismiss the proceedings, said motion being as follows, to-wit:

“Defendant moves to quash this proceeding for the reason:

“First. It is not authorized by law.

“Second. The alleged grade or change for the proposed sidewalk is indefinite, uncertain and not determined in any definite or certain manner.

“Third. The alleged condemnation of defendant’s present sidewalk is unauthorized and an attempt to take her property without due process of law and in violation of section 30, article 2, of the Constitution of this State, and in violation of section 21 of said article 2.”

The court, as previously stated, sustained the motion, dismissed the proceedings and rendered final

judgment against the petitioner, which duly appealed, as before stated.

I. Counsel for appellant contends that the action of the circuit court in sustaining the respondent's motion to quash the proceedings or to dismiss the case was erroneous. This contention is controverted by counsel for respondent, who insist that there is no law authorizing such proceedings.

**Sidewalks
and Grade
of Streets:
Statutes.**

This insistence of counsel for respondent is untenable, for sections 9258 to 9275, both inclusive, Revised Statutes 1909, fully authorize this proceeding, and provide in detail each and every step that must be taken in order to assess the damages and benefits that might accrue on account of the change of the grade of a street or sidewalk; and fully authorizes the construction of the walk.

We, therefore, decide this insistence against the respondent.

II. Counsel for appellant next insist that the court erred in dismissing the suit for the reason stated in the motion, that "the alleged grade or change of grade for the proposed sidewalk is indefinite, uncertain and not determined in any definite or certain manner."

**Grade of
Sidewalk.**

We are of the opinion that this insistence is well founded, for the reason that when we read the ordinance ordering the sidewalk to be constructed, which must be read in connection with the one authorizing the assessment of damages and benefits, it is seen that it provides that the top surface of the walk to be constructed, shall, "when finished, conform to the grade stakes of the city engineer, now set and in place."

While these two ordinances refer to different matters, yet they were enacted at the same time, and with one common design, namely, to construct the sidewalk

mentioned, which under the Constitution of this State, could not be done until the damages and benefits which might accrue by the change of grade have been assessed and paid.

It might have simplified matters if the ordinance authorizing the assessment of damages and benefits had also established the grade of the sidewalk; but we have been cited to no authority holding that the grade could not be fixed by the ordinance ordering the walk constructed.

This question is also decided against the respondent.

Counsel for respondent also assails the validity of the proceedings because the stakes fixed to mark the grade of the walk are not permanent—easily moved or destroyed.

That is true, but the permanency of grade monuments is a matter to be addressed to the city government, and not to the courts. Their purpose is to indicate the grade line, in order that the commissioners may know the change to be made, and the damages or benefits that will result to the property by reason thereof; also to inform the contractors where to place the surface of the sidewalk.

The walk after having been constructed will of itself constitute a permanent monument of the grade line thereof; as much so as almost any monument the city could establish.

The United States surveys of this vast domain are marked by stones, stakes, trees and such other materials as the Government saw proper to use, all of which may be easily and readily removed or destroyed, as is shown by the thousands that have been moved or destroyed.

Moreover, all the streets of cities and the roadbeds of the various railroads are graded according to stakes or other monuments set by engineers.

In our opinion this insistence of appellant is well founded. But suppose that it should be conceded that respondent is correct regarding this matter, still that would be no ground for dismissing the suit.

III. Counsel for both parties have presented and discussed several constitutional questions regarding the damages and benefits to be assessed, and for and against whom they should be assessed; also the amount of land that should be embraced in the benefit district, etc.

Constitutional
Questions Not
Reviewable.

None of these questions is properly before this court, because the circuit court, instead of trying the exceptions filed by the respondent to the report of the commissioners, dismissed the entire case, without passing upon any of these questions.

This court can only review the rulings of the court below, and since that court did not pass upon the matters here presented, we have no authority to rule upon them.

For the reasons stated, the judgment is reversed, and the cause remanded with directions to the circuit court to set aside the order dismissing the cause and reinstate the same, and to proceed with the trial of the exceptions filed; and if it is of the opinion that the exceptions are not well founded, then to render judgment confirming the report of the commissioners; but upon the other hand, if the court should be of the opinion that the exceptions are well taken, then the exceptions should be sustained and a new order made appointing other commissioners to assess damages and benefits, etc., and thereafter proceed with the case as is provided for by law and the statutes mentioned.

All concur.

ALICE M. STOCKWELL et al., Appellants, v.
MAJOR A. STOCKWELL et al.

Division One, December 19, 1914.

1. **PARTITION: Conveyance in Tail: Life Tenant Living: Contingent Remainders.** Under Sec. 2872, R. S. 1909, providing that one who by the laws of England would have become seized in fee tail of lands, shall be deemed to be seized for his life only, the remainder to pass in fee to those to whom the estate would have first passed by the common law at his death, and Sec. 2874, which provides that the remaindermen shall take as purchasers, the grantee in a deed reading to her and her "body heirs" cannot, without statutory authority, have the land sold for partition between her and her children and thus destroy the reversion.
2. ———: ———: ———: ———: **Sec. 2559, R. S. 1909.** Sec. 2559, R. S. 1909, providing that where lands are held in joint tenancy, tenancy in common, or coparcenary, including estates in fee, for life, or for years, tenancy by the curtesy and in dower, any of the parties interested may maintain a suit for partition, affords no authority to a grantee in a deed to her and her bodily heirs to maintain partition between her and her children.
3. ———: ———: ———: ———: **Sec. 2612, R. S. 1909.** Sec. 2612, R. S. 1909, providing that if in any case, from the nature and amount of the property to be divided, and the number of the owners, partition in kind cannot be made without great prejudice to the owners, an order of sale may be made without the appointment of commissioners, leaves to Sec. 2559 the designation of the title necessary to maintain the proceeding, and gives a contingent remainderman no right to a sale for partition.
4. ———: ———: ———: ———: **Representation of Expectancies.** The fact that the law allows partition of joint tenancies and tenancies in common, each possessory holder being regarded as the representative in the partition proceedings of the owners of expectant estates, whether vested or contingent, limited upon his interest, affords no authority for partition, while the first taker lives, by the joint tenants of a contingent remainder under a conveyance in tail, especially where the owner of the reversion is not joined.

Appeal from Ray Circuit Court.—*Hon. Francis H. Trimble*, Judge.

AFFIRMED.

Carolus & Wilcox for appellants.

(1) The court erred in overruling plaintiffs' demurrer to the new matter contained in defendant's answer, "that under the law this estate cannot be partitioned and that the heirs of James M. Stockwell are necessary parties." *Robertson v. Brown*, 187 Mo. 462. (2) The court erred in its finding and judgment that the estate described in plaintiffs' petition could not be partitioned, and in dismissing plaintiffs' petition and denying partition. *Reinders v. Koppleman*, 68 Mo. 482; *Preston v. Brant*, 96 Mo. 552; *Godman v. Summons*, 113 Mo. 122; *Sikemeier v. Galvin*, 124 Mo. 367; *Sparks v. Clay*, 185 Mo. 393; *Acord v. Beaty*, 244 Mo. 126.

Frank B. Fulkerson and *Frederick D. Fulkerson* for respondents.

(1) Mrs. Stockwell, having under the conveyance a life estate only, holding the entire forty acres of land so long as she lives, could not bring a partition suit for the reason that she had nothing to partition. She has it all, so long as she lives, with a right to do as she pleases with it. *Hayes v. McReynolds*, 144 Mo. 348; *Atkinson v. Brady*, 114 Mo. 200. The other plaintiff, Edith Grace Stockwell, has a contingent remainder only. Her interest depends entirely upon her surviving her mother. The interest which plaintiff Edith Grace Stockwell takes cannot become vested until after her mother's death. Respondent contends that because Edith Grace Stockwell did not have at the time the suit was brought (nor has she yet) a vested estate she is not a proper party plaintiff. If neither plaintiff could alone bring this suit surely both of them together cannot bring it. In order to successfully bring partition

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the plaintiff must have a present, definite, fixed and vested interest in the land. It is not possible for this or any other court at the present time to determine who the bodily heirs of Alice M. Stockwell are, nor can that fact be determined until after her death. The moment Alice M. Stockwell dies the remainder or remainders that now must be considered contingent will immediately become vested. If Edith Grace Stockwell should die before her mother the entire estate now contingent will be vested in the defendant, Major A. Stockwell, thus demonstrating the futility of this partition proceeding. (2) Under the statutes of this State plaintiffs neither singly nor collectively are authorized to bring partition. Sec. 2559, R. S. 1909; *Rutherford v. Rutherford*, 115 Am. St. 799; *McConnell v. Bell*, 130 Am. St. 770; *Field v. Leiter*, 125 Am. St. 997; *Brown v. Brown*, 28 L. R. A. (N. S.) 125; *Smith v. Smith*, 57 S. W. 198; *Johnson v. Johnson*, 170 Mo. 58; *Collins v. Crawford*, 214 Mo. 167; *Sullivan v. Sullivan*, 66 N. Y. 37; *Stephens v. Endus*, 13 N. J. L. 271; 2 *Sharswood & Budd*, Am. Law of Real Property, p. 375.

BROWN, C.—This is a suit for partition. The petition was filed in the Ray County Circuit Court February 25, 1911, and states that James M. Stockwell on June 27, 1905, being the owner in fee of the northeast quarter of the northeast quarter of section 28, township 54 of range 29 in said county, conveyed it by general warranty deed to the plaintiff Alice M. Stockwell and her bodily heirs; that said grantee is now fifty years old and has two children only, plaintiff Edith Grace Stockwell and defendant Major A. Stockwell, and that there is no living descendant of any deceased child; that Major A. Stockwell is a minor and the defendant D. B. Kelley is his guardian and curator of his estate; that the interest of plaintiff Edith Grace is subject to a mortgage executed by her to Henry S.

Kelley for \$175, and Henry S. Kelley is now deceased and defendant D. B. Kelley is his administrator; that the land is not susceptible of division in kind. It asks for partition and that it be sold and the proceeds divided among the parties entitled according to their respective rights and interests, and that the present value of the life interest of Alice M. Stockwell be computed and paid to her in cash.

The answer admits the facts so stated, denies the right to partition the land, and states that the interest of Alice M. Stockwell is subject to mortgage secured by her to Ralph R. Kelley to secure \$200 with interest at eight per cent; and that the heirs of James M. Stockwell, of whom there are several, are necessary parties. Demurrers both to the petition and new matter in the answer having been overruled the cause went to trial upon an agreement substantially as set forth in the pleadings, and judgment was given for the defendants, the court holding that the estate was not subject to partition and that the heirs of James M. Stockwell were necessary parties.

I. The parties present but one question in this appeal. It is whether the life tenant and one of the two contingent remaindermen may maintain an action against the other remainderman for the sale of the land in partition under our statute, upon this title. We have used the words "under our statute" because the appellant, in his argument, distinctly invokes the statute as the authority for the proceeding, and we find nothing in the law authorizing the life tenant to call upon a court of equity to exercise its beneficent jurisdiction for the sole purpose of cutting off, by sale, the right of the contingent remainderman without giving a reason why. Nor have we been more fortunate in finding, in the principles and rules of equity, authority for his co-remainderman to do the same thing. We treat the suit as a simple proceeding for the *sale* of the

land, because all parties in their pleadings agree that it is not susceptible of physical division.

All the parties claim by deed from the owner of the fee to plaintiff Alice M. Stockwell, mother of her co-plaintiff and the defendant Major A. Stockwell, who are her only descendants. The defendant conveyed the land to the grantee "and her body heirs." That this is equivalent to "her bodily heirs," or "the heirs of

Statute de
Donis.

her body" is evident, and unquestioned by the parties. In determining the estate taken by these words it is unnecessary to

trace the rise and fall of the estate tail from the Statute De Donis, which probably created it so long ago as the year 1285, through the struggle to judicially maintain its evident purpose exemplified in the famous case of *Wolfe v. Shelley*, 1 Co. 88, into our own Statute of Uses which built a new structure upon the same old foundation. [R. S. 1909, secs. 2872, 2874.] To understand this modern structure in its application to this cause it is necessary to keep in mind its ancient foundation. The Statute De Donis (13 Edw. I, c. 1) recited that "where one giveth land to another and the heirs of his body issuing" it seemed hard to the givers and their heirs that their will so expressed in the gift should not be observed, and that "after issue begotten and born between them (to whom the lands were given under such condition) heretofore such feoffees had power to alien the land so given, and to disinherit their issue of the land, contrary to the minds of the givers, and contrary to the form expressed in the gift; and further when the issue of such foeffee is failing, the land so given ought to return to the giver or his heir by form of the gift expressed in the deed, though the issue, if any were, had died; . . . yet the donors have heretofore been barred of their reversion;" and it accordingly enacted that "they to whom the land was given under such condition shall have no power to aliene the land so given, but that it shall remain unto the issue

of them to whom it was given after their death, or shall revert unto the giver or his heirs if issue fail either by reason that there is no issue at all, or if any issue be it fail by death, the heirs of such issue failing." We have quoted so liberally because in this statute we find the best and most perfect expression of the law of entail by which inalienable titles to lands were transmitted from parent to child, subject to the law of primogeniture, to the most remote generation, and reverted to the original donor or his heirs upon failure of issue. In this form the estate tail came to America with the common law of England.

By the Revised Statutes of Missouri 1845 (p. 219, sec. 5) our Legislature enacted: "That from and after

Modified by
Missouri Law.

the passage of this act, where any conveyance or devise shall be made, whereby the grantee or devisee shall become seized in law or equity, of such estate, in any lands or tenements, as under the statute of the thirteenth of Edward the First (called the statute of entails), would have been held an estate in fee tail, every such conveyance or devise shall vest an estate for life only in such grantee or devisee, who shall possess and have the same power over, and right in such premises, and no other, as a tenant for life thereof would have by law, and upon the death of such grantee or devisee, the said lands and tenements shall go and be vested in the children of such grantee or devisee, equally to be divided between them as tenants in common, in fee, and if there be only one child, then to that one, in fee, and if any child be dead, the part which would have come to him or her, shall go to his or her issue, and if there be no issue, then to his or her heirs."

This statute, it will be observed, referring to the Statute De Donis by another name, swept the estate tail which it created out of existence so effectually that where the tenant in tail expectant died without issue before the life tenant, the lands, at the termina-

tion of the life estate, vested in his heirs generally. It is not necessary to inquire whether this provision was inconsistent with that provision of section 7 of the same act which directed that on the termination of the life estate the persons who should be the heirs or heirs of the body of the tenant for life should be entitled to take as purchasers by virtue of the remainder limited to them, because in enacting the General Statutes (p. 442, sec. 4), the Legislature noticed the incongruity, and replaced section five by the one which has been continued through all the revisions, and is now in force as section 2872, Revised Statutes 1909. It provides that "the remainder shall pass in fee simple absolute to the person to whom the estate tail would, on the death of the first grantee, devisee or donee in tail, first pass according to the course of the common law, by virtue of such devise, gift, grant or conveyance." And this first estate in fee simple vests by purchase and not by descent. [Id., sec. 2874.]

It may be said with much verbal reason that this statute in its present form expressly adopts the common-law rule of primogeniture in its application to estates in fee tail of this character. This rule, however, had its foundation in a feudal system of land tenures that no longer exists except in tradition. It is long since it had any reason for being, except to perpetuate a landed aristocracy, and it is contrary to the spirit of our Federal Constitution and the institutions upon which our government is founded and has never been in force in this country. [Tiedeman on Real Property, sec. 474.]

From applying these principles it is easy to determine the relation of the parties to this suit to the land which is its subject. Mrs. Stockwell is seized of a life estate, so that no one can share with her the right to the possession of the whole during her life, and it ceases absolutely at her death. The stat-

Partition:
Estate Tail:
Life Tenant
Living:
Contingent
Remainders.

ute not only withholds from her the power to determine to whom it shall then go, but it denies to her the capacity to be the medium through which it shall pass by providing that the remainderman shall take as purchaser from her grantor, so that it cannot be determined whether either of her children, parties to this suit, will take a vested interest in the land until her death shall fix its final disposition. Should both children live, they would, as purchasers under the deed, take the land as tenants in common. Should one of them die childless the other would take the entire fee. Should he leave children these would take as tenants in common with the survivor. If they should both die, leaving children, the children of both would take the fee as tenants in common. Should they both die childless during the mother's lifetime, and she should die without leaving other children, the land would revert to the grantor or his heirs as the case might be. But whoever will take upon the death of Mrs. Stockwell will not do so through her, or represent her with respect to the title, but as grantee in the deed under which she holds the life estate and upon her death may be identified by the description in the deed as definitely as if it granted to them the estate by name.

In so conveying the title to this land James M. Stockwell was not only exercising the common right to dispose of his own, but was making that disposition in the precise form the Legislature had enacted for that purpose. He had the right under this statute to determine that the land itself should be preserved for and go to the descendants of Mrs. Stockwell, in a form that did not admit of its being wasted, and that, in default of issue of her body living at the time of her death, it should go back to him and his heirs, and unless, as plaintiffs claim, there is something in the statute relating to partition which interferes with the disposition so plainly permitted in this one, and authorizes the court to take from him the fee which remains in

him to support his reversion, there is plainly no authority for the maintenance of this suit. [Tiedeman on Real Property (3 Ed.), 431 and note.]

II. The first section of the article relating to partition (R. S. 1909, sec. 2559) is as follows: "In all cases where lands, tenements or hereditaments are held in joint tenancy, tenancy in common, or coparcenary, including estates in fee, for life, or for years, tenancy by the curtesy and in dower, it shall be lawful for any one or more of the parties interested therein, whether adults or minors, to file a petition in the circuit court of the proper county, asking for the admeasurement and setting off of any dower interest therein, if any, and for the partition of the remainder, if the same can be done without great prejudice to the parties in interest; and if not, then for a sale of the premises, and a division of the proceeds thereof among all of the parties, according to their respective rights and interests."

This section refers only to lands held, at the time the suit may be instituted, in joint tenancy, tenancy in common, or coparcenary. The estate so held may include estates for life or for years as well as in fee, and also includes tenancy by the curtesy and in dower. The controlling feature of the provision is that there must be an existing undivided tenancy or holding in land by two or more owners, susceptible of being so parceled between them as to become a several holding by each. We may at the outset eliminate Mrs. Stockwell, the life tenant, because she not only has nothing which is susceptible of division, her tenancy covering in its breadth the entire estate and in its length the period of her life, in and during which no other person can have any interest unless severed from this freehold by her own act. That this does not constitute a subject for partition is not only evident from the use of

a word which, in such a connection, can have no other meaning than the severance of common and undivided interests, but also from the frequent adjudications of this court. [Atkinson v. Brady, 114 Mo. 200; Throckmorton v. Pence, 121 Mo. 50; Stewart v. Jones, 219 Mo. 614.]

In the Throckmorton case a title depended upon the validity of a suit in partition by the plaintiff, who, under a deed similar to this one, was the owner of a life estate in an undivided half of a tract of land with remainder in fee to her three children, and had acquired the other undivided half of the same land by descent from her father subject to the payment of his debts. She and her children joined in a suit in partition to have the land in which she held the life estate and her children the remainder upon condition of survival, set off from that part which she had inherited from her father subject to the payment of his debts; and a decree was rendered accordingly. This court, reversing the judgment, held the partition void, saying (p. 58): "The proceedings in partition were absolutely void; plaintiff being the sole owner of the land, she could not maintain partition proceedings against herself, and the administrator of her father's estate had no interest in the land of his intestate which would authorize him to prosecute a partition suit, or to make him a party thereto." The administrator was made a party in that case. Eliminating him, as did the court, left the suit in the precise situation of this one, in which the sole parties are the life tenant and contingent remaindermen. In the Atkinson case, *supra*, it was held that while the tenant by the curtesy could not maintain a suit to partition the life estate so held by him, yet where the estate by the curtesy concurred in the same owner with an undivided fifth of the remainder, he might maintain a suit against the owners of the other four-fifths to divide the property subject to the curtesy, leaving the latter intact. While in the Stew-

art case, *supra*, the decision was placed upon the statute declaring that "no partition or sale of lands . . . devised by any last will shall be made . . . contrary to the intention of the testator expressed in any such will," the same principle seems to be involved as in this case and there is no intimation that a different rule should apply in a case involving title by deed. Mrs. Stockwell, then, having no undivided interest in the land that could be the subject of partition, her presence can afford no support to the right of the other parties to this relief asked. She is a party only to be present and to contend for and receive what falls to her by reason of the relief, if any, to which the others may be entitled.

III. The appellants do not contend that the life tenant of the entire property may, by partition, have her estate severed from some imaginary residue of the whole, or that contingent remaindermen, who have no other estate than a hope limited by their
Sec. 2612,
R. S. 1909. fears, are entitled to have it reduced by the court to the terms of acres, measured off and given to them in severalty. They do not even claim, so far as we can see, that the statutory judgment characteristic of all partition, ascertaining and declaring the rights, titles and interests of the parties, which hang in the scale of life and death, and may at any time be found wanting, can by any possibility be arrived at and entered. They simply say that by the terms of this statute no separable interest is necessary to the maintenance of partition, but that it may be maintained for the sole purpose of securing a sale of property in which there are no common interests susceptible of ascertainment and division; and they point to section 2612 as the foundation of this theory. It provides that "if in any case, from the nature and amount of the property sought to be divided, and the number of the owners, it shall be apparent to the

court that the assignment of dower, if any, and partition thereof, in kind, cannot be made without great prejudice to the owners, an order of sale may be made, without the appointment of commissioners." This provision alone seems conclusive against their contention. It singles out and specifies the instances in which it is intended to give the court such jurisdiction and the ground upon which it may be exercised. It rests only upon the nature and amount of the property and the number of the owners. It leaves the matter of title necessary to call it into action to the first section, which requires that it be a joint tenancy, a tenancy in common or coparcenary, and stands upon the ground that, as was said by this court in *Martin v. Trail*, 142 Mo. 85, 97, "the primary object in a partition suit is to separate interests into distinct portions of the land to be held by the respective owners in severalty," from whence comes its jurisdiction.

**Representation
of Expectant
Estates.**

It frequently happens that a life estate is divided among many tenants in common. The husband after his curtesy has become consummate by the death of his wife, sometimes transfers undivided interests to different purchasers. Lands assigned and held as dower are frequently disposed of in the same way. Joint tenancies and tenancies in common in life estates are constantly created both by will and by deed, and the policy of the common law as well as all the various statutes passed to carry into effect or modify its rules, has always been to favor the partition of these tenancies at the demand of either or any of the owners, so that they may not be tied together like the *Kilkenny Cats* to prevent escape from their differences, or compelled to live like two dogs who must gain their sustenance from the same bone. For this reason the common law from time immemorial has favored the partition of such possessory estates and our statute by the section first quoted is expressly applied to them.

This application met various difficulties which had to be and were overcome in accordance with the principles which created the necessity. Frequently two estates tail, or life tenancies upon which were limited successive remainders and reversions, vested or contingent, as well as joint tenancies and tenancies in common under leases for years, existed in the same land, and the problem was to permit the partition of those estates which lie in possession without injustice or unnecessary interference with those who might, whether in being or not yet born, have rights springing up in the future. To meet this necessity the rule came into existence that in case of voluntary partitions fairly and honestly made by those having the possessory title they should when justice and equity should require it, be considered the representatives of those whose interests had not yet accrued to them, who would therefore be bound by the act, so that their common expectancy would be converted into an expectancy in severalty of that part of the land which represented the interest to which it had attached. In case of judicial partition the same principle was applied. If those in being were made parties to the proceedings and properly notified the result bound them, for the judgment of the court was conclusively presumed to be right. Those not in being were supposed to be represented by those upon whose title their expectancy was founded. This principle has been recognized and acted upon by the English courts for more than a hundred years (*Wills v. Slade*, 6 Ves. Ch. 498; *Gaskell v. Gaskell*, 6 Sim. Ch. 643), and was followed and recognized in our own statute. [R. S. 1909, secs. 2561, 2562, 2563, 2564.] In all these cases the estate in expectancy was lifted from the undivided interest to which it attached and settled upon the divided share into which it had been changed by the partition, but in no case to which our attention has been called has it been held that contingent interests like those in this case, without legal title to sup-

port them, but abiding the manifestation of the will of providence concerning them at the termination of the existing life estate, are primary subjects of that judicial division which we call partition. The shadow cast by the reversion is somewhat denser and more tangible than that of the contingent remainders, because it includes the fee simple title awaiting final investiture under the deed, but in this case the plaintiffs have not thought it worth while to make the reversioner a party.

Without further elaboration we hold that the children of Mrs. Stockwell have not such a title as enables them to maintain partition.

IV. It only remains to examine some of the cases in which the question we have been considering has been referred to by this court. The diversity of the views we have expressed in these lends to this case its principal interest and difficulty. *Reinders v. Koppelman*, 68 Mo. 482, did not involve the question now before us. The plaintiff owned an estate for the life of his wife and was in possession of the land. The remainder of one undivided half was *vested* in himself and three of the defendants in equal shares, while the remainder in the other undivided half was partly *vested* in the heirs of the testator whose will created all the existing estates in the land, and partly contingent in the heirs of the living devisee for life. The heirs of the testator were parties, as were also those designated in the record as the "ostensible heirs" of the devisee. The question was, as will be readily seen, whether the presence of these small contingent interests prevented the other remaindermen from having their vested interests set off to them, as was done in *Atkinson v. Brady*, subject to the life estate. We have carefully read this case in connection with its facts, and find no expression in it which indicates that the learned and distinguished judge who

Missouri
Cases.

wrote the opinion intended to assert the doctrine that partition will lie among contingent remaindermen during the existence of the life estate upon which it is limited. In fact he rests his decision entirely upon the authority of *Wills v. Slade*, *supra*; *Gaskell v. Gaskell*, *supra*, and *Mead v. Mitchell*, 17 N. Y. 210, in all of which the question was whether or not partition could be had between the owners of the present possessory title so as to bind contingent remaindermen not *in esse*.

Preston v. Brant, 96 Mo. 552, another case cited by the appellants, was placed directly upon the authority of *Reinders v. Koppelman*, and the holding was that partition would lie, during the life of the life tenant, among those in whom the remainder had vested.

The only case to which we have been referred by the appellants, or which we have been able to find, which seems to sustain their position in this case, is *Sikemeier v. Galvin*, 124 Mo. 367, which was partition in which the life tenant and her brothers and sisters, who were all her "ostensible heirs" were petitioners. The land was held by devise to her for life, "and upor her death to pass to and to be vested in her right heirs, whether lineal or collateral, as the same would be declared by the present laws of the said State of Missouri concerning descents and distribution." The court, referring to *Reinders v. Koppelman*, said:

"On the authority of this case, and the cases therein and in appellant's brief cited, it would seem that this action can be maintained, unless in contravention of the testator's will; for it must be remembered that all the interest that any of the parties have in the real estate, is held under and by virtue of the provisions of the will, and our statute provides that no partition or sale of lands, devised by last will, shall be made contrary to the intention of the testator, expressed in such. [R. S. 1889, sec. 7142.]

“The effect of this proceeding will be to transfer the title in fee of the lot to the purchaser thereunder, in the lifetime of the life tenant. There is no express limitation in the will upon the alienation of the premises during the life of Mrs. Sikemeier. She, of course, could dispose of her life estate at any time, and so could the remaindermen, as a contingent remainder is alienable under our law. [Godman v. Simmons, 113 Mo. 122.] And the provisions in the tenth item of the will, by which the parties to this action who are the ‘ostensible heirs or devisees’ therein mentioned are expressly authorized, all concurring, to sell and convey the premises in fee simple, for reinvestment during the lifetime of the tenant for life, can hardly be construed as a prohibition of a resort to a mode of alienation authorized by law, at the instance of one or more of such heirs or devisees, by which the same purpose may be accomplished (R. S. 1889, secs. 7137-7163); for it goes without saying that upon a sale of the premises, in this proceeding, the net proceeds thereof, after the value of the interest of Mrs. Sikemeier has been ascertained and commuted, would have to be reinvested in accordance with the provisions of the will, under the order of the court until the termination of the life estate.”

It will be observed that a sale of the property was expressly authorized by the will for the purpose of reinvestment in other St. Louis realty or to be loaned on real estate security, the reinvestment to remain subject to the same trust and conditions as the devised land. Whatever we may think of some of the language of the opinion, it is plain that the court really decided that partition was a mode of alienation and reinvestment to which the parties might resort in carrying out these provisions of the will, and we do not wish to be understood as now holding that it was not right.

In *Sparks v. Clay*, 185 Mo. 393, cited by the appellants, there were tenants in common of the freehold; two of whom were seized in fee simple and the other two of life estates with remainder in fee simple to the heirs of their respective bodies. The suit was in ejectment by a child of one of the life tenants born after a sale of the premises under a judgment in partition between the tenants of the freehold, to which the children then *in esse* of the two life tenants were parties. The court properly held that the plaintiff was bound by the judgment.

The last case decided in this court in which this general question was involved is *Hill v. Hill*, 168 S. W. 1165. The title involved was a devise by which the testator gave to his son and the son's wife the land in question "during their natural lives" and at the death of both to be divided equally between all his grandchildren; but in case the son should die before the daughter-in-law it was to be divided equally between her and the grandchildren. The testator died, and, without waiting for the death of either of them to further simplify the title, the son and his wife brought partition, asking, as in this case, for a sale, and that the value of the life estate be paid to them out of the proceeds. The defendant grandchildren demurred on the ground that the petition showed on its face that the lands were not subject to partition. The demurrer was sustained, and judgment entered accordingly, from which the appeal was taken. The appellant in this court relied for the reversal of the judgment chiefly on *Reinders v. Koppelman*, *supra*, *Preston v. Brant*, *supra*, and *Sikemeier v. Galvin*, *supra*. In affirming the judgment, BROWN, J., for Division No. 2 of this court said: "While the three cases mainly relied upon by appellant may not have been expressly overruled, they have been intentionally disregarded in cases where they were cited and could have been followed. We hold they are not con-

trolling authority in this State, in so far as they conflict with the conclusions announced in this case.”

We find nothing in the Missouri cases supporting the theory of the appellant in this case, and, if we did, we would be slow to follow it. We have also not only carefully examined the cases adjudicated in other jurisdictions to which we have been referred, but the importance of the question as here presented has led us to some original investigation of our own with the same result, and we do not care to become pioneers in the invention of judicial devices to frustrate the attempts of owners to devote their lands to the sustenance of their families and others, so that it may be preserved and transmitted in kind, either as a whole or in parcels representing their respective interests, to the ultimate objects of their solicitude. That this may be done while effectually preventing the owners in common with others of vested interests in the land from debarring their co-owners from partition by limiting contingent remainders upon their own undivided interests, is fully illustrated by the terms of our statute as interpreted by this court in the decisions to which we have referred. While fully recognizing the right of partition as it before existed, and extending it, it only withholds it from those who have no such title or interest as can be fixed and adjudicated by the courts. What rights these latter may have that might, under appropriate circumstances, call for partition in equity, belongs to a field of inquiry not opened up to us in these pleadings.

It follows from what we have said that the judgment below must be affirmed. *Blair, C.*, concurs.

PER CURIAM.—The foregoing opinion by BROWN, C., is adopted as the opinion of the court. All the judges concur.

THE STATE v. E. W. BAKER, Appellant.**Division Two, December 23, 1914.**

1. **EVIDENCE: Error in Exclusion: Cured by Cross-Examination.** On a trial for embezzlement, error in sustaining an objection to a question whether the prosecuting witness had expected to marry the defendant was cured by the fact that after such ruling the witness was fully cross-examined on that point and stated that there was a prospect that they might marry in the future.
 2. **——: Theory of Defense: Embezzlement.** While it is true that when the evidence in a criminal case tends to establish a defense inconsistent with the testimony of the defendant, he is not bound by his testimony, but is entitled to instructions on the theory shown by the other evidence, yet he may not cause the court and adversary counsel to pursue a certain course and then at the outcome repudiate its legal validity; and accordingly, where a defendant on trial for embezzling \$2000 testified that he never received the sum in question, and his attorneys at the trial said they did not claim it was borrowed money, the testimony of the prosecuting witness at the preliminary examination was properly admitted at the trial, although the examining court had refused to permit her to say whether she had received \$50 for the use of \$200 lent the defendant at another time, thus, the defendant asserts, denying him the right to a full cross-examination, and of the value of a fact, if the question had been affirmatively answered, from which the jury might have inferred that the \$2000 was a loan also.
 3. **——: Judge's Comment at Preliminary Hearing: Incompetent at Trial: Harmless Error.** Although comment on the evidence by a judge at a preliminary examination is not competent evidence on the trial, yet where the evidence itself was before the jury and clearly bore out the judge's comment, the admission of the judge's expression was harmless error.
 4. **——: Impeaching Witness: Particular Instances of Misconduct.** The character of a witness cannot be impeached by showing through other witnesses special instances of misconduct.
 5. **——: Admissibility: Embezzlement: Defendant Showing Possible Use of Money by Prosecutrix.** Proof that the prosecuting witness, since deceased, whose testimony at the preliminary
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hearing was read in evidence at the trial of the defendant for embezzlement, had been in trouble with the Federal officers and had hired lawyers to represent her, was not competent without a showing that the lawyers were paid the money the defendant was charged with embezzling.

6. **ORDER OF PROOF: Discretion of Court: Embezzlement.** The order of testimony rests largely in the discretion of the trial court, and it is not error to admit in rebuttal testimony which might have been given in chief.
7. **ARGUMENT of Counsel: Epithets not Approved: Non-prejudicial Error.** Epithets applied to a defendant by the State's attorney in his argument to the jury are not approved, but where the court is satisfied that calling the defendant a "crook" did not influence the verdict there is no ground for reversal.
8. ———: **Expressing Belief in Defendant's Guilt: Non-prejudicial Error.** An expression by the State's attorney in his argument to the jury of his belief in the defendant's guilt is not approved; but such misconduct of counsel is not reversible error when the evidence clearly justified a conviction.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow*, Judge.

AFFIRMED.

W. R. Scullin for appellant.

John T. Barker, Attorney-General, and *Thomas J. Higgs*, Assistant Attorney-General, for the State.

ROY, C.—Defendant was convicted of embezzlement and sentenced to two years in the penitentiary.

The evidence for the State tended to show that on the 4th of January, 1912, Mrs. Mary L. Barber delivered to him in currency \$2000, which, by agreement between them, he was to place in a safe deposit box in the bank for her and return to her on demand. She was between fifty and sixty years of age and had been twice married. She was separated from her second husband, who lived in Denver. She owned the house in which she lived at 2316 South 12th street,

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St. Louis. A son by her first husband and the son's wife lived with her. Her home was encumbered by a mortgage for \$4000, which fell due May 8 or 9, 1912. One John W. Mackelden owed her \$3000 secured by mortgage and she had other resources sufficient when converted into cash to clear the home of the encumbrance. She was a midwife and had been conducting a sanitarium, which she had recently ceased keeping.

The defendant was thirty years old, having a wife and one child. He had lived ten years in St. Louis and had been five years in the employ of the National Telephone Directory Company. His business was to procure contracts for advertising in the telephone directory.

Defendant and Mrs. Barber became acquainted in October, 1908, when he called to get her contract for advertising. Between that time and January 4, 1912, he secured six different contracts from her, ranging in amount from \$36 to \$225.

The evidence for the State was that defendant visited Mrs. Barber about twice a week, often taking her on car rides, to the theatre and to dinner; all of which he denied, except that he admitted that he was at her house about twice a month, also admitted that she did not know that he was married and that he was at her house half a dozen times after January 4, 1912, prior to his leaving the city about the first of February. In November, 1911, the defendant and Mrs. Barber visited a fortune teller, who told the fortune of each out of the hearing of the other. The fortune teller testified that while the defendant's fortune was being told he offered witness \$50 if she would induce Mrs. Barber to let him have \$1500; that the witness refused and told Mrs. Barber not to let defendant have her money, saying to her, "Go home to your own daughter and grandchildren; that man is too young for you; don't give him your money." Defendant in his evidence admitted that he heard the

fortune teller say to Mrs. Barber, "You go home to your family, don't go to supper with that man." He also testified that he advised Mrs. Barber to put her money in a safe deposit box and that she told him that in January she would have some money coming in. He testified that at various times he borrowed small sums from Mrs. Barber and paid her for the use of the money; that he loaned her various small sums; that he borrowed \$200 from her in December, 1911, and that he paid it back. She testified that he returned the \$200 with \$10 for the use of it and then took it away again the same evening and that she hadn't gotten it back.

Mr. Mackelden testified that he paid Mrs. Barber \$2000 in bills on her front porch on January 4, 1912.

Defendant's counsel at the trial conceded that she had the money. Defendant testified that she was owing him \$45 and that he went to her house about January 4, 5, or 6, 1912, to get it. He then proceeded as follows, "She said she expected a party to pay her some money and he didn't come. I waited a while and she said some one is at the door now. She came in after while and handed me the money in bills." He stated that he saw only the \$45.

Mrs. Barber testified that on January 4, 1912, she delivered to the defendant \$2000 in bills, under a promise from him as follows: "I will put it in the safety deposit vault now and nobody can touch it, or find out where it is, and then the day you need it, all you have got to do is to let me know and I will bring it to you." Her daughter-in-law as a witness confirmed that testimony. Mrs. Barber also testified that the \$2000 was not delivered to defendant as a loan.

About the first of February, 1912, the defendant left St. Louis and went to Chicago, where he stayed with his family until September 15 following. He did nothing while there and had no source of income. He

testified that during the time he was there his brother paid him a debt of \$200 and that he became indebted to his brother for about \$150. After defendant left St. Louis, Mrs. Barber made inquiries for him in vain, then reported the matter to the police. She testified that she had never recovered any of the money.

Mrs. Barber was dead at the time of the trial. She testified at the preliminary examination of the defendant in the court of criminal correction. She was asked on cross-examination whether she had not expected to marry the defendant. An objection to the question was sustained, but immediately afterwards she was fully cross-examined on that subject, and stated that there was a prospect that they might marry in the future. As a part of her cross-examination a letter written by her to the defendant's wife after his arrest was read in evidence, which contained the following: "If I had been able to come, I would have come to see you today. I am very sorry for you. If you feel half as bad as I do, you are indeed in need of sympathy. Of course, pity does no good. I have been acquainted with Mr. Baker some years but never knew he had a wife and the attentions he paid were those of a single man. We went to the theatre once or twice a week and took long car rides. He took me to dinner, I sit luncheon for him here and he spent evenings with me; New Year's Eve he stayed until twelve o'clock, then wished me many returns of the day. I said, where will we be next New Year? . . . I have been loaning him money for short periods. He brought it back at the agreed time, so he gained my confidence and when I received notice that my husband was going to sue me for half of my property, I just had four thousand dollars ready to pay a deed of trust off on my home. Mr. Baker urged me to get the money in cash and let him deposit it in a safety deposit and he would bring it to me the first of May when due."

Defendant's counsel then proceeded to question her on the theory that the letter stated or implied that the \$2000 was a loan to defendant. Judge Falkenheimer, of the examining court, said, "No, that letter doesn't mean that, Mr. Scullin, by any manner of construction."

She was asked on cross-examination whether she had an agreement with defendant that he should pay her \$50 for the use of the \$200 which she loaned him. The examining court, without any objection being made, said, "That hasn't anything to do with this. For the purpose of this hearing we will assume that this woman loaned him money and got good compensation."

At the trial defendant objected to the reading in evidence of her testimony thus given, for the reason that by the above rulings the examining court had prevented defendant from fully cross-examining her. The trial court overruled the objection, and her testimony was read to the jury. During the reading of her testimony, the trial court said, "You do not claim that this was borrowed money;" and defendant's counsel answered, "Not the \$2000 or \$4000."

On the cross-examination of Lizzie Burkett, the daughter-in-law of Mrs. Barber, defendant endeavored show that Mrs. Barber's sanitarium was closed in 1909 by reason of a fraud order issued by the government forbidding her the use of the mails. An objection was sustained. The following then occurred:

"Mr. Scullin: Can't I show the bad reputation of the prosecuting witness?

"The Court: Not in that way.

"By Mr. Scullin: Q. At the time did you know anything about your mother-in-law's business with her attorneys or business affairs? A. No, sir.

"Q. You do know, do you not, that she had business regularly with her attorneys?

"A. Mr. Maroney: I object to that.

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"Mr. Scullin: I want to show the money was expended for the payment of attorneys.

"The Court: I do not see any bearing that it has.

"Mr. Scullin: I want to show the natural drain in the expenditure of money.

"The Court: I do not think it is competent.

"Defendant at the time duly excepts to the ruling of the court."

Also the following:

Mr. Scullin: I desire to show at the time of Mrs. Barber's death and for some time preceding the same, she had been in difficulties with the local health authorities and had employed Messrs. Zachritz & Bass to extricate her from those difficulties; and that in addition there was by reason of this controversy with the Bell Telephone Company over the publication of advertisements in the telephone book, by reason of an order of the Postmaster-General of the United States, prohibiting to Mrs. Barber the use of the mail for herself and her enterprise. I desire to show that at the time of her death and preceding the same Mrs. Barber had received decoy letters from Federal officers and had answered them and was being investigated by the Federal grand jury, and in answering those letters had made offers to procure abortions and to prevent conception in cases of intercourse, and that she had employed lawyers to protect her in this trouble and that is where the money went."

"Mr. Maroney: We object to that.

"The Court: I do not see what effect it would have even if granted; the objection will be sustained.

"Defendant at the time duly excepts to the ruling of the Court."

Officer Robert L. Agee testified that when arrested defendant said that he didn't remember Mrs. Barber; and that he didn't think she ever had any money.

On cross-examination defendant testified that he may have said when arrested that he did not know

Mrs. Barber, but that he misunderstood their meaning. He testified that he did not remember saying that Mrs. Barber never had two thousand dollars.

Officer Kilker, in rebuttal, testified as follows:

"Q. What was stated there? A. 'Mr. Baker, we have been looking for you for some time. Have you been out of town?' He said, 'Yes.' I said, 'You are under arrest.' 'What is the charge?' We said, 'You are charged with embezzlement, you got some money from a lady down south.' He said, 'Who is it?' We told him Mrs. Barber; Mrs. Barber has been living at 2316 South Twelfth street. He said, 'I don't remember the name; I don't remember her, I got no money from anybody.' I said, 'We will take you to the chief's office.' We took him up and he was identified by Mrs. Barber, she came there."

The defendant objected to such evidence on the ground that it was in chief and not in rebuttal. The objection was overruled.

State's counsel in his argument to the jury said: "Here is shown the crook going out and ingratiating himself into the favors of an old woman, resorting to every device known to the low man to gain her confidence, and then, like the man he is, violate it; and I want you men to sound a warning to this community that the cunningness of a crook won't save him."

Defendant's counsel objected to the above language and asked the court to tell the jury to disregard it. The court said, "It is for the jury to determine from the evidence."

The State's counsel in his argument also said: "What I want to say to you is that if I did not believe from the testimony in this case that a jury ought to find him guilty I wouldn't tell you to do it."

Defendant objected and asked the court to reprove the State's counsel. The court said: "He has the right to state he is conscientiously pursuing his

duty. It is for the jury to determine from the evidence, not from the speeches."

**Evidence: Error
In Exclusion:
Cured by
Cross-Examination.**

I. The error of the examining court in sustaining the objection to the question asked Mrs. Barber as to whether she had expected to marry the defendant was cured by the fact that after such ruling she was fully cross-examined on that point and stated that there was a prospect that they might marry in the future. [1 Thompson on Trials (2 Ed.), sec. 707; Inlow v. Bybee, 122 Mo. App. 1. c. 482.]

**Embezzlement:
Theory of
Defense.**

II. Counsel for appellant contends that the refusal of the examining court to permit Mrs. Barber to answer the question as to whether she and defendant had an agreement that she should receive \$50 for the use of the \$200 loaned him, was a refusal of the right to a full cross-examination and rendered the testimony of Mrs. Barber incompetent on the trial. Counsel insists that if he had been permitted to show that she was to receive \$50 for the loan of the \$200 it would have been a fact from which the jury could have inferred that the \$2000 was a loan also.

Appellant is in no position to raise that point here. The trial court, after overruling defendant's objection to the reading of Mrs. Barber's testimony to the jury, and while it was being read, said, "You do not claim that this was borrowed money?" To which defendant's counsel answered, "Not the \$2000 or \$4000." Mrs. Barber testified that the \$2000 was not a loan. The defendant testified that he had never received it.

We are aware that it has been held, and properly so, that where the evidence tends to establish a defense which is inconsistent with the testimony of the

defendant on the stand, the defendant is not bound by his testimony, but is entitled to an instruction on the theory of the defense thus shown by the other evidence. [State v. Bidstrup, 237 Mo. 1. c. 285.]

If there had been evidence in the case tending to show that the \$2000 was loaned to defendant, it would have been proper to submit that theory to the jury though the defendant had testified to the contrary. The defendant is not conclusively bound by his own testimony. But a different question is presented here. When the trial court made the inquiry as to whether defendant claimed that the \$2000 was a loan, and received the negative answer, the court was justified in acting on the theory that evidence on that point was not material, and that the refusal of the examining court to allow her to answer such questions did not render her testimony inadmissible at the trial.

Judge SHERWOOD said in State v. Clark, 121 Mo. 1. c. 512:

“Parties litigant are not allowed to take inconsistent positions, as attempted in the present instance. They will not be permitted to cause the court and adversary counsel to pursue a certain course, and then at the outcome deny and repudiate the legal validity of that very line of conduct, and thus ‘tread back and trip up the heels of their adversary.’ [Slack v. Lyon, 9 Pick. 62; Brown v. Bowen, 90 Mo. 184; Bigelow on Restop. (3 Ed.), pp. 562, 601, 602; McClanahan v. West, 100 Mo. 309.]”

III. The trial court permitted

Judge's Comment: the State's counsel to read to the jury
At Preliminary in connection with Mrs. Barber's testi-
Hearing. mony the statement of Judge Falken-
 heimer to the effect that Mrs. Barber's letter to Mrs. Baker did not mean that the \$2000 was a loan. That statement of the judge was not competent evidence, but it was certainly harmless. It stated a fact that

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was apparent to the jury. The letter was before them, and it did not express the idea that it was a loan, but clearly expressed the contrary. We are unable to see how the statement of the judge could in any way prejudice the defendant.

**Impeaching
Witness:
Particular
Instances.** IV. The refusal of the court to permit the witness Lizzie Burkett to testify on cross-examination as to whether Mrs. Barber's sanitarium had not been closed by reason of a "fraud order" issued by the Postal Department was not error. The character of a witness cannot be impeached by showing through other witnesses special instances of misconduct. [State v. Sassaman, 214 Mo. l. c. 735.] Neither was it error to exclude the other evidence offered to show other instances of the misconduct of Mrs. Barber.

The offer of defendant to prove that Mrs. Barber was under investigation by the Federal grand jury, and was in difficulty with the local health authorities, was incompetent for the same reason, and his further offer to show that, by reason of such facts, she had employed lawyers to represent her in those matters and that her money went to pay the expenses growing out of such matters.

**Showing
Possible Use
of Money.** It certainly was not competent to show such matters in order to impeach Mrs. Barber. The fact that she had lawyers employed raised no presumption that the \$2000 went to pay them. If defendant had any competent evidence that Mrs. Barber's lawyers got the money, the court was not informed of it, and it properly excluded the evidence offered.

**Order of
Proof.** V. The court did not err in permitting officer Kilker to testify in rebuttal as he did. Such matters are largely in the discretion of the trial court. It is claimed that

the evidence given by him was such as should have been given in chief. It was said in *State v. Murphy*, 118 Mo. l. c. 15, "The order of testimony is a matter that must necessarily be left largely to the judgment of the trial courts, and unless a clear case of abuse is shown it is no ground for reversal."

Argument of Counsel. VI. The State's counsel, in his argument to the jury, characterized the defendant as a crook. Judge Norton, in *State v. Zumbunson*, 86 Mo. 111, held that invective when called forth by the character of the crime, will not justify a reversal. That case was cited with many others in *State v. Rasco*, 239 Mo. l. c. 581. It was said in the latter case that this court does not approve the use of epithets, but that if we are satisfied that the verdict was based solely upon the evidence and the law, uninfluenced by such language, the case will not be reversed.

In *State v. Gartrell*, 171 Mo. 489, this court said that calling the defendant an assassin and a snake was not reversible error, saying that counsel merely called the defendant what the evidence for the State tended to prove him to be. That case disapproved the use of epithets, and so do we. But where, as in this case, we are satisfied that such conduct of the attorney did not influence the verdict we see no ground for reversal. We call attention to *State v. Gordon*, 253 Mo. l. c. 517. Neither do we approve the conduct of counsel in expressing to the jury his belief in the defendant's guilt. But it is our duty to closely scrutinize the evidence and to judge whether such misconduct had a prejudicial effect on the jury. It is impossible for us to see how the jury could have reached a different conclusion. Under such circumstances, the misconduct of counsel does not amount to reversible error. There were other objections made to the language used to the jury by the prosecution, but the

necessary preliminary steps were not taken to bring the point here.

The judgment is affirmed. *Williams, C.*, concurs.

PER CURIAM.—The foregoing opinion of *Roy, C.*, is adopted as the opinion of the court. *Walker, P. J.*, and *Faris, J.*, concur; *Brown, J.*, concurs in result.

JOHN POWERS, Appellant, v. MISSOURI PACIFIC
RAILWAY COMPANY.

Division Two, December 23, 1914.

1. **SUPREME COURT: Appellate Jurisdiction: Amending Petition: Amount Reduced after Nonsuit and Before Appeal.** Where a plaintiff who asked \$10,000 damages took a nonsuit with leave, and after his motion to set aside the nonsuit and grant him a new trial was overruled the trial court allowed him, before taking his appeal, to amend his petition by reducing his prayer for damages from \$10,000 to \$4500, the Supreme Court, and not the Court of Appeals, has jurisdiction of his appeal.
2. **MASTER AND SERVANT: "Operating Railroad:" Fellow-Servant Act: Car Repairer.** A car repairer while working at his task in the repair yards of a railroad company is "engaged in the work of operating such railroad" within Sec. 5434, R. S. 1909, and is entitled to damages from the company for injuries caused by the negligence of a fellow-servant.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Williams*, Judge.

REVERSED AND REMANDED.

A. R. & Howard Taylor for appellant.

(1) The action of the St. Louis Court of Appeals transferring this cause to this court was erroneous and unauthorized by law. The reduction of

plaintiff's claim from \$10,000 to \$4500, before the appeal was taken, left the amount in controversy within the jurisdiction of the St. Louis Court of Appeals at the time the appeal was taken. *State ex rel. v. Broaddus*, 212 Mo. 689. (2) The case of *Schwyhart v. Barrett*, 223 Mo. 501, on which the St. Louis Court of Appeals grounded its decision transferring this case to this court, was not an authority for such action. (3) Assuming that the transfer of the cause was correct, and that this court is possessed of jurisdiction, as we are willing to hope, then the action of the trial court in taking the case from the jury by a peremptory instruction was error. (4) The appellant was engaged at the time of his injury in the work of operating respondent's railroad, as was the co-servant Krietmeier, within the language and intent of Sec. 5434, R. S. 1909, then in force. *Callahan v. Railroad*, 170 Mo. 495, 194 U. S. 628; *Sams v. Railroad*, 174 Mo. 99; *Hawkins v. Smith*, 242 Mo. 696; *Railroad v. Melton*, 218 U. S. 48; *Orendorf v. Railroad*, 116 Mo. App. 348; *Houston v. Railroad*, 129 Mo. App. 583; *Turner v. Railroad*, 132 Mo. App. 43; *Pratt v. Railroad*, 139 Mo. App. 508; *Prash v. Railroad*, 151 Mo. App. 413. (5) There was no evidence in the case on which the court could declare the appellant negligent as a matter of law. *Prash v. Railroad*, 151 Mo. App. 413.

James F. Green for respondent.

(1) The cause was properly transferred to this court, as the amount named in the petition on which the case was tried was in excess of \$7500. *Schwyhart v. Barrett*, 223 Mo. 501; *Hennessy v. Brewing Co.*, 145 Mo. 115; *Casey v. Transit Co.*, 116 Mo. App. 270; *Union v. Mfg. Co.*, 251 Mo. 450. (2) Work in a shed or machine shop repairing a car is not "operating a railroad" within the meaning of Sec. 5434, R. S. 1909.

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Callahan v. Railroad, 170 Mo. 496; Overton v. Railroad, 111 Mo. App. 613; Sams v. Railroad, 174 Mo. 66; Williams v. Railroad, 106 Mo. App. 63; Stubbs v. Railroad, 85 Mo. App. 196; Schneider v. Railroad, 117 Mo. App. 129; Vilter Mfg. Co. v. Kent, 105 S. W. 525; Moit v. Railroad, 82 C. C. A. 430; Holtz v. Railroad, 72 N. W. 806; Perry v. Railroad, 41 N. W. 289. (3) There was no negligence proved in the case. Plaintiff's injury was the result of mere accident, for which there is no liability. Wendall v. Railroad, 100 Mo. App. 556; Saxton v. Railroad, 92 Mo. App. 494; Henry v. Railroad, 113 Mo. 525; Sawyer v. Railroad, 37 Mo. 262.

WILLIAMS, C.—This is a suit to recover damages for personal injuries received by plaintiff while in the employ of the defendant company. Trial was had in the circuit court of the city of St. Louis, and at the close of plaintiff's evidence the court sustained defendant's demurrer to the evidence and permitted the plaintiff to take a nonsuit with leave to move to set the same aside. Thereafter, and within proper time, plaintiff filed a motion to set aside the nonsuit and to grant him a new trial in the cause, which motion was by the court overruled. Several days thereafter, but during the same term of court at which plaintiff's motion for a new trial was overruled, the court, by order of record, permitted plaintiff to amend his petition by interlineation by changing the prayer for damages from \$10,000 to \$4500, and thereafter permitted plaintiff to take an appeal to the St. Louis Court of Appeals. After the case reached the St. Louis Court of Appeals, that court, upon respondent's motion, transferred the cause to the Supreme Court on the ground that the amount in controversy, at the time judgment was rendered in favor of defendant, was beyond the jurisdiction of the Court of Appeals.

Plaintiff's evidence tends to establish the following facts: On the day the injury occurred, plaintiff, together with a fellow workman, Krietemeyer, was in the employ of the defendant company doing repair work on cars located in defendant's repair yards near Compton avenue in the city of St. Louis. Many tracks were located in this repair yard and a portion of same was covered by a long rough shed, open on the sides but covered by a roof. The machine shops of defendant company were located some 300 feet distant from the repair yard. Cars needing repair were shoved into this repair yard over the railway tracks therein located. The heavy repair work was done at the yards near Compton avenue, and the light repair work at the repair yards at Twenty-first street. At the time of the injury, plaintiff and his co-worker were engaged in repairing the coupling on one of the cars located in this repair shop. The trucks had been removed from under this car and the car was supported by barrels or trusses. The trucks were located on the track, ahead of the car, and after the repair work was finished, the trucks were to be rolled back under the car so that the car could be taken out and placed in a train. In repairing the car in question, it became necessary to drive the brake-pin, which had been bent, out of the coupling. In doing this plaintiff held a portion of the coupling in such position that his coemployee, Krietemeyer, could strike the brake-pin with a maul. Krietemeyer, without looking for any obstructions that the maul might encounter in being swung, made a swing with the maul, and in so doing the maul engaged the brake guide above the coupling, causing the maul to glance out of its course and strike plaintiff's left hand, mashing and breaking the bones in the third finger thereof. Afterwards blood poisoning developed in the injured finger and it was necessary to amputate the finger at the middle joint. Plaintiff was laid up nearly a year with his injury and it

became necessary to cut open his hand to drain the pus. As a result of the injury, he was rendered unable to follow his former occupation as a car repairer and had been rendered unable to secure employment of any kind on account of his disability.

Appellant makes the following contentions: First, that the St. Louis Court of Appeals erroneously transferred this case to the Supreme Court; second, that at the time of his injury, appellant was engaged in the work of operating respondent's railroad, as was his co-servant, Krietemeyer, within the language and intent of section 5434, Revised Statutes 1909, and that therefore the trial court erred in overruling his motion to set aside the nonsuit and for new trial.

I. After final judgment, but before the appeal was allowed, the circuit court permitted plaintiff to strike out the words "ten thousand" in the prayer of the petition and to interline in lieu thereof the words "forty five hundred." At the time the appeal was taken the jurisdictional limit of the Court of Appeals was \$4500. Appellant contends that by thus changing his petition, after final judgment, the amount in dispute, for the purposes of this appeal, was placed within the jurisdictional limit of the Court of Appeals and that hence the Court of Appeals later erroneously certified the case here. We are unable to agree with this contention. In determining the amount in dispute for the purpose of appellate jurisdiction where the plaintiff is cast in his suit and appeals, as in the present instance, the amount claimed in the petition is generally taken as the amount in dispute. [Schwyhart v. Barrett, 223 Mo. 497, l. c. 501.]

When a money judgment is rendered the amount of the judgment controls, if the appeal is taken by the judgment debtor, and the difference between the

amount claimed and the amount of the judgment if the appeal is taken by the judgment creditor. [Foundry & Manufacturing Company v. Moulder's Union, 251 Mo. 448 and cases therein cited.]

In the case of Schwyhart v. Barrett, supra, where a money judgment was rendered and the appeal was taken by the judgment debtor, it was held that "the amount in dispute is to be determined by the amount due at the date of the judgment from which the appeal is taken." Applying this rule to the present case, the amount due, or claimed to be due, at the date of the judgment from which the appeal was taken, was, as then shown by the petition, \$10,000, and therefore sufficient to bring the case within the jurisdiction of this court.

II. Was plaintiff, at the time of receiving the injury, engaged in doing such work for the defendant company as to bring him within the aid of section 5434, Revised Statutes 1909, commonly known as the Railroad Fellow-Servant Act? In other words, was he "engaged in the work of operating such railroad," as provided by said statute? This is the main question presented by this appeal. That Krietemeyer was the fellow-servant of plaintiff is not disputed. There was also sufficient evidence to pass to the jury for determination the question as to whether the act of Krietemeyer which resulted in the plaintiff's injury amounted to negligence.

In determining whether plaintiff's work was within the protection of the above statute, little aid is received from a review of the decisions of the courts of other States. This is due in a great measure no doubt to differences existing in the respective statutes. One line of authorities holds that the work must be such as carries with it the peculiar hazard of railroad operation, incident to the movement of trains. Another line of authorities holds to a more liberal interpreta-

Fellow-Servant
Act: Operating
Railroad: Car
Repairer.

tion. Whether the first line of authorities may or may not have been somewhat influenced by the belief that such limited construction was necessary in order to allow the act to pass certain constitutional barriers cannot be determined with accuracy, yet a review of those authorities shows that the courts so holding had such danger in mind.

That such limited construction is not necessary in order to allow the statute to clear the Federal Constitutional barriers was clearly settled by the Supreme Court of the United States in the case of *Louisville & Nashville Railroad Company v. Melton*, 218 U. S. 36.

A sufficiently comprehensive review and discussion of the Employer's Liability Statutes and decisions of other States, together with a discussion of the proper construction to be placed upon the Missouri statute will be found in the case of *Callahan v. Merchants' Bridge Terminal Railroad Company*, 170 Mo. 473, and therefore further discussion of the same would serve no useful purpose in the present case. In that case the Court in Banc in construing the Missouri statute held that a member of a section gang stationed underneath a railroad bridge to warn passers-by of the danger from falling ties that were being removed and discarded by the section men at work in repairing the bridge, was "engaged in the work of operating such railroad" within the meaning of the Missouri statute, and that the railroad company was liable in damages for his injuries sustained by reason of the negligence of his co-employees. In discussing the statute the court said:

"Under the language of our statute it is necessary for the injured employee to show that he was injured 'while engaged in the work of operating such railroad.' Construed either by its own terms or in the light of the cases cited from other jurisdictions, it results in holding that the right to recover is not limited to cases where the injury is inflicted by reason of the

negligence of a fellow-servant while actually moving a train or engine, but that the law embraces all cases where the injury is inflicted upon an employee while engaged in the work of operating a railroad, by reason of the negligence of any fellow-servant who is likewise engaged in the work of operating a railroad, and that the term 'operating such railroad' includes all work that is directly necessary for running trains over a track, and that it includes section hands who are engaged in working upon, repairing or putting in shape the track, roadbed, bridges, etc., over which the trains must run."

The construction placed upon the statute by the Callahan case has remained undisturbed for many years and has been many times followed by the different courts of appeal. No reason is now advanced nor does any occur to us calling for a reconsideration of the conclusion therein reached.

Applying the logic and analogy of that case to the present we are driven, irresistibly, to the conclusion that plaintiff, at the time of receiving his injury, was "engaged in the work of operating such railroad" and clearly within the scope of said statute. The work of repairing the cars in the repair yard of the defendant company was as closely connected with and as necessary for the operation of trains as was the work of track repair in the Callahan case.

It therefore follows that the judgment should be reversed and the cause remanded for a new trial. It is so ordered. *Roy, C.*, concurs.

PER CURIAM.—The foregoing opinion of WILLIAMS, C., is adopted as the opinion of the court. *Walker, P. J.*, and *Brown, J.*, concur; *Faris, J.*, not sitting.

CASIMIR J. WELCH v. HUGH J. MCGOWAN,
CHARLES E. SMALL and RANDAL MORGAN,
Appellants.

Division Two, December 23, 1914.

1. **NEGLIGENCE: Obstruction in Public Street: Knowledge.** Where a plaintiff, driving in a buggy, in broad daylight, along a public street, with actual knowledge of the existence of loose gas pipes and other temporary obstructions therein, is injured by the wheel of his buggy coming in contact therewith, he cannot recover for his resulting injuries, unless he exercised ordinary care to observe and avoid such obstructions. The rule that in driving along a public highway he had the right to assume (without looking) that said highway was free from obstructions, has no application where he had actual knowledge of such obstructions. Such actual knowledge required him to keep a diligent lookout for them.
2. ———: ———: ———: **Protruding Gas Pipe: Failure to Look: Contributory Negligence.** And though the defendant were negligent in permitting the end of a large gas pipe to protrude into that part of the street left open to public travel, that did not relieve the driver of a buggy along the part left open from the duty of keeping a lookout for temporary obstructions after he observed that the street was torn up for the purpose of laying gas pipes; and if, with such knowledge, he did not look out for such protruding end, and fails to show that he could not have driven around it if he had looked and seen, his injury must be *held* to be the direct result of his own negligence.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn*, Judge.

REVERSED.

Gage, Ladd & Small for appellants.

(1) The demurrer to the evidence ought to have been sustained. *Phelan v. Paving Co.*, 227 Mo. 666; *Hesselbach v. St. Louis*, 179 Mo. 505; *Craine v. Met. St. Ry.*, 246 Mo. 393; *Nessler v. Wrecking Co.*, 156 App. Div. (N. Y.) 348; *Johnson v. New York*, 208 N.

Y. 77; *Nolan v. King*, 97 N. Y. 565; *Westfall v. Water Commissioners*, 93 Mich. 210; *Lockport v. Licht*, 221 Ill. 35; *District of Columbia v. Moulton*, 182 U. S. 576; *Dart v. Bagley*, 110 Mo. 42; *Sedalia ex rel. v. Smith*, 206 Mo. 346; *Glaser v. Rothschild*, 221 Mo. 180; *Kansas City ex rel. v. O'Connell*, 99 Mo. 357; *Vogelgesang v. St. Louis*, 139 Mo. 127; *Fogg v. Nahant*, 98 Mass. 578; *McFarlane v. Sullivan*, 99 Wis. 361; *Johnson v. Superior*, 103 Wis. 66; *Ritger v. Milwaukee*, 99 Wis. 190; *Long v. Moon*, 107 Mo. 334; *Nugent v. Milling Co.*, 131 Mo. 241; *Payne v. Railroad*, 136 Mo. 562; *Sanguinette v. Railroad*, 196 Mo. 466; *Weltmer v. Bishop*, 171 Mo. 110; *Avery v. Fitzgerald*, 94 Mo. 207; *Flynn v. Wacker*, 151 Mo. 545; *Champagne v. Hamey*, 189 Mo. 709; *State v. King*, 203 Mo. 560; *Meier v. Proctor & Gamble Co.*, 81 Mo. App. 410; *Stafford v. Adams*, 113 Mo. App. 717; *Pickens v. Railroad*, 125 Mo. App. 669; *Schaub v. Railroad*, 133 Mo. App. 444; *Brockman Com. Co. v. Aaron*, 145 Mo. App. 307; *Graefe v. Transit Co.*, 224 Mo. 232; *Trigg v. Land Co.*, 187 Mo. 22; *Coin v. Lounge Co.*, 222 Mo. 508; *Oates v. Met. St. Ry.*, 168 Mo. 535; *Cohn v. Kansas City*, 108 Mo. 387; *McFarlane v. Elevated Ry. Co.*, 194 Mass. 183; *Morgan v. Lewiston*, 91 Me. 566; *McCloskey v. Moies*, 19 R. I. 297. (2) The demurrer to the third amended petition ought to have been sustained. *Morgan v. Lewiston*, 91 Me. 566; *McCloskey v. Moies*, 19 R. I. 297; *Kansas City ex rel. v. O'Connell*, 99 Mo. 357.

Walsh, Aylward & Lee and *E. R. Morrison* for respondent.

(1) Appellants were negligent in permitting the pipe in question to project into the traveled way. Primarily the public are entitled to the use of the entire street. *Kossman v. St. Louis*, 153 Mo. 59; *Schoop v. St. Louis*, 117 Mo. 131. And one who obstructs or encroaches upon it has the burden of showing the ob-

struction to have been reasonably necessary and with the least danger to public travel. *Senhenn v. Evansville*, 140 Ind. 678; *Jackson v. Robinson*, 26 Wis. 642. The encroachment must be reasonable in extent and in time, and must be non-negligent. *Gerdes v. Iron & Foundry Co.*, 124 Mo. 354; *Dougherty v. St. Louis*, 251 Mo. 525; *Phelan v. Paving Co.*, 227 Mo. 707; *Hesselbach v. St. Louis*, 179 Mo. 522; *Dillon on Municipal Corporations* (5 Ed.), sec. 1170; *Fugate v. Somerset*, 97 Ky. 48; *Pottier v. Gas Co.*, 183 Pa. St. 575; *Pennock v. Douglas County*, 39 Neb. 305; *Chicago v. Brophy*, 79 Ill. 279; *Frazier v. Borough*, 172 Pa. 403, 51 Am. St. 739. (2) The evidence shows that plaintiff had not lost control of his horse. Even if he had lost control this would not bar his recovery. *Hull v. Kansas City*, 54 Mo. 598; *Winship v. Enfield*, 42 N. H. 197; *Vogelgesang v. St. Louis*, 139 Mo. 127; *Ring v. Cohoes*, 77 N. Y. 83; *City of Joliet v. Shufeldt*, 144 Ill. 403; *Opdycke v. Railroad*, 29 L. R. A. (N. S.) 71; *Elliott on Roads & Streets* (3 Ed.), sec. 793; *Railroad v. Stone*, 54 Kan. 83; *Weisner v. Dillon*, 29 Mont. 122; *Crawfordsville v. Smith*, 79 Ind. 308; *Manderschied v. Dubuque*, 25 Iowa, 108; *Martin v. Algona*, 40 Iowa, 390; *Turn. Co. v. Bateman*, 68 Md. 389; *Dillon v. Raleigh*, 124 N. C. 184; *Gray v. Water Power Co.*, 27 Wash. 713; *Baldwin v. Turnpike Co.*, 40 Conn. 238; *Augusta v. Hudson*, 94 Ga. 135; *Janes v. Tampa*, 52 Fla. 292, 120 Am. St. 203; *McLemore v. City of West End*, 159 Ala. 235; *Emporia v. White*, 74 Kan. 864; *McDowell v. Preston*, 104 Minn. 263, 18 L. R. A. (N. S.) 190. Even if he lost control it was only temporary. *Johnson v. Marquette*, 154 Mich. 50. (3) Plaintiff was not negligent in failing to discover the obstruction. *Coffey v. Carthage*, 186 Mo. 573; *Alexander v. St. Joseph*, 170 Mo. App. 376; *Barr v. Kansas City*, 105 Mo. 558; *Weisenberg v. Appleton*, 26 Wis. 59, 7 Am. Rep. 39; *Kendall v. Albia*, 73 Iowa, 248; *Webb v. Heintz*, 97 Pac. (Ore.) 753; *Valparaiso v.*

Schwerdt, 40 Ind. App. 608; Dale v. Syracuse, 24 N. Y. Supp. 968, 71 Hun, 449; Johnson v. Fargo, 15 N. D. 524. (4) The projecting pipe was the cause of plaintiff's injury. (5) Plaintiff did not have knowledge of the projecting obstruction and did not assume the risk thereof. Knight v. Kansas City, 138 Mo. App. 153; Graney v. St. Louis, 141 Mo. 185; Loewer v. Sedalia, 77 Mo. 431; Chilton v. St. Joseph, 143 Mo. 192; Devlin v. St. Louis, 252 Mo. 207; Loftis v. Kansas City, 156 Mo. App. 683; Tackstein v. Bimmerle, 150 Mo. App. 491; Taylor v. Springfield, 61 Mo. App. 266; Keitel v. Cable Ry., 28 Mo. App. 662; Powers v. Ins. Co., 91 Mo. App. 65; Phelan v. Paving Co., 227 Mo. 666; Craine v. Railroad, 246 Mo. 393; Cohn v. Kansas City, 108 Mo. 387; McFarlane v. Railroad, 194 Mass. 183.

BROWN, J.—Action for personal injuries in which plaintiff recovered a judgment for \$17,500, and defendants appeal. Kansas City was made a defendant in this action, but, upon the coming in of the testimony, the court sustained a demurrer to the evidence as to said defendant city, whereupon the cause proceeded to judgment against the other defendants above named.

Plaintiff charges that defendants placed a gas pipe on the surface of 13th street in Kansas City, Missouri, in such a negligent manner that it was a dangerous obstruction to said street, and that while plaintiff was driving his horse and buggy eastwardly on said street on April 23, 1907, the wheels of his buggy struck said gas pipe in such manner as to cause plaintiff to be thrown out of his buggy and into a deep ditch, from which fall he received severe and permanent injuries.

The defense is contributory negligence and assumption of risk.

To arrive at a more complete understanding of the manner in which plaintiff received his injuries, we will explain that 10th street and 13th street in Kansas City, Missouri, run east and west, and 10th street lies north of 13th street. Walnut street in said city runs north and south. The first north-and-south street lying west of Walnut is Main street, and the second parallel street west of Walnut is Baltimore avenue. The block between Walnut and Main streets is divided north and south by an alley.

At the time plaintiff received his injuries defendants had dug a ditch and were preparing to lay a large gas pipe along 13th street from Walnut to Baltimore avenue. Defendants had deposited gas pipes twelve feet long and eighteen inches in diameter along the north side of this ditch from Walnut street to the alley which divides the block lying between Walnut and Main.

There is a slight conflict in the evidence as to whether these gas pipes were lying all along the north side of the ditch from Walnut street to Baltimore avenue. Plaintiff says that he does not remember seeing any gas pipes except between Walnut street and the first alley west thereof. He did, however, remember observing (before his injury) that 13th street was "cut open" with a ditch all the way from Baltimore avenue to Walnut street.

Thirteenth street has a width of about thirty-five feet from curb to curb. The ditch was dug by defendants a little south of the center of the street, and a roadway for vehicles was kept open along the north side of the ditch. There is some conflict as to the width of this roadway, but practically all the witnesses state that there was room enough between the north curb of the street and the pipes placed beside the ditch aforesaid for two wagons to pass each other by careful driving.

Plaintiff, whose age was thirty-seven, started to drive his "black filly" from 10th street to a messenger office kept by him at 13th and Walnut streets. His vehicle was a low buggy, and a young lady accompanied him on the drive. Plaintiff further testified that he did not usually drive along 13th street as he could reach his office at 13th and Walnut by another street, and, therefore, did not know that 13th street was torn up until he drove onto it. He also testified that he drove south from 10th street down Baltimore avenue to 13th street, and thence eastwardly along the north side of 13th street to the alley between Main and Walnut, where the right wheel of his buggy struck a gas pipe left in the roadway by defendants, causing him to be thrown forward and southward into the ditch dug by defendants, whereby he received very severe and permanent injuries.

Plaintiff and his witnesses also testify that defendants had not dug the ditch across the first alley west of Walnut street, but had excavated the ditch up to the east side of said alley and constructed a barricade from the south curb of the street to and across the end of the ditch at said alley. The barricade is variously described as being from eighteen inches high to as high as the seat in the buggy which plaintiff was driving. Said witnesses for plaintiff further stated that the west end of the first gas pipe lying east of said barricade had been left protruding into the roadway left open for use of persons traveling along the 13th street. Some of said witnesses state that the end of said gas pipe stuck out into the roadway one foot, while others thought it protruded as much as six feet, and that it had been left in that condition a week.

The evidence of defendants' witnesses tend to show that the end of the gas pipe did not stick out into the roadway, and that the work of digging the ditch and placing the pipes in 13th street had only been in operation four days.

Plaintiff says that as he was crossing Main street, something like one hundred feet west of the alley, his filly threw her tail over the right check-line and thereafter she went faster. His route was down grade and his horse trotted along. Plaintiff tried to get the check-line or rein from under his filly's tail without success. When he arrived at the barricade across the end of the ditch at the alley beforementioned, he reined his filly to the left around the barricade, but did not see the pipe in the roadway. He then leaned forward to lift the filly's tail off of the rein, and, while in such leaning position, the right wheel of his buggy struck the gas pipe and caused him to be thrown forward and southward into the ditch. Plaintiff further testifies that he could not see the gas pipe before he struck it on account of the barricade. His evidence runs as follows:

“Q. I will get you to describe just how this matter occurred, to these gentlemen, Mr. Welch. A. Well, I drove south on Baltimore to Thirteenth, and then I turned east on Thirteenth, and I got to about the car track and the horse switched her tail and caught the line . . . She was just going kind of little out of a walk—kind of a slow trot; and when she got the line under her tail, she paced up, and I pulled on the line and made one or two efforts to get it from under her tail, and at that time I got to about the alley . . . As I looked out to look ahead I saw that barrier, and I didn't want to hit that. After I came in the roadway there was only eight or nine feet to go through there; and I looked ahead and everything looked clear, excepting a wagon about half way down the block. Then I reached over to lift the line from under the mare's tail, and as I did that the wheel hit this pipe and I went into the ditch, and the lady went right on top of me.

“Q. Where was this pipe, with reference to the

asphalt and dirt and stuff there? What position was the pipe in? A. It was sticking out right in the road.

"Q. This pipe that stuck out in the roadway—how far, to your view, did it appear to be sticking out in the roadway there? A. Oh, two or three feet. I don't remember just how far. I know it was sticking quite a ways out in the roadway.

"Q. How close were you to it when you first saw it? A. I never saw it until I got right on top of it and hit it. As far as that gentlemen there is to the jury (indicating).

"Q. What were you doing from the time you left Main street until you noticed this pipe in front of you? A. I was trying to get the line from under the horse's tail.

"Q. You drove on the north side of Thirteenth street from the time you hit it at Thirteenth and Baltimore, because they were working on the south side of the street? A. They wasn't working there. It was cut open. It was after working hours.

"Q. You say it was 'cut open?' Is that the reason you drove on the north side of Thirteenth street? A. Yes, sir.

"Q. Now, it is down hill all the way from the east line of Main street to this alley and down to Walnut street, ain't it? A. Yes, sir. . . .

"The Witness: When the buggy hit that pipe it went scooting along like it was a rail, and I went further.

"Q. You hit the north side of the pipe and it went scooting along? A. That brought it closer to the ditch as it slid along, and when I went over I hit the hub of the buggy on the second pipe to the east. . . .

"Q. Go ahead and finish your answer. A. (Continuing) I saw the barrier and saw how far it extended into the street, and coming around it I just turned the horse to go past, and in the meantime I was trying to get the line off of its tail.

Welch v. McGowan.

"Q. You said that you looked ahead and couldn't see the pipe—that you couldn't see this pipe, that was as big as a buggy wheel? A. The barrier was as high as my buggy seat.

"Q. You pulled around that, so as to get rid of it? Whether you call it a 'pile of dirt' or whatever you call it—you pulled around to get rid of it, and you couldn't see the pipe for this pile of dirt, or barrier? A. Well, I didn't see it.

"Q. Could you have seen it? A. I didn't see it. . . . I wasn't looking for a pipe stuck over on the roadway, where they were inviting persons to come in there."

Plaintiff also testified that his filly was gentle; that children could drive her, but admitted that on a former trial of this cause he testified as follows:

"Q. You didn't stop to take her tail off the line? A. No, sir. I was not worrying; she had done that a hundred times before; you see, she is a saddle mare and carries a high tail, and she was always doing that."

Something like a dozen eyewitnesses for plaintiff stated that they saw him and his horse before and at the very time of his injury; that the horse was excited or irritated on account of getting its tail over the line. When the front wheel of the buggy hit the pipe it tipped over to the right, and the horse went on, carrying the shafts of the buggy with her.

OPINION.

I. Learned counsel for plaintiff and defendants have cited a long list of authorities to sustain their respective contentions, which authorities will be found in the prefixed notes of our official reporter. Many of the cases cited by counsel have little or no bearing upon the issues presented here, because based on facts different from those found in this record.

Driving on
Public Street:
Knowledge
of Defect.

There is no dispute over the fact that plaintiff observed that 13th street was "cut open" (as he described it) with a ditch for the purpose of laying pipes therein, before he attempted to drive along said street.

The issue then arises, did the plaintiff, possessing as he did actual knowledge that 13th street was not in its usual state of repair, or in the condition in which streets and roads are ordinarily, exercise ordinary care to observe and avoid such obstructions as were temporarily in said street by reason of the repairs or improvements then being made therein?

There is much well-considered authority which sustains the contention of plaintiff that in driving along a public highway he had a right to assume (without looking) that said highway was free from obstructions, but that rule of law is without application here, because of plaintiff's actual knowledge that said street was not in its usual condition—he had actual knowledge that the street was "cut open" for the purpose of burying a pipe or making some other change therein, and that part of the street was closed by a barricade.

With the actual knowledge on the part of plaintiff it was his duty to keep a diligent lookout for obstructions which might be temporarily in the street by reason of the work that was being done therein, and to anticipate noises which might frighten a team.

The gas pipe which plaintiff's wheel struck was eighteen inches in diameter at the end nearest to plaintiff as he drove against it, yet he swears he did not see it. He declined to state that he could not have seen the pipe in time to have driven around if he had been looking at the ground where his buggy was going—he speaks of reining his horse around the barricade which defendants had constructed partly across the street—that his horse, though a little excited, was gentle and still under control; so we are unable to see any reason why he did not observe the pipe and drive

around it, thereby averting the accident and consequent severe injuries which he sustained.

If it is true that defendants were negligent in allowing one end of the gas pipe to protrude into that part of the street left open for travel, this did not relieve plaintiff of the duty of keeping a lookout for temporary obstructions after he observed that the street was torn up, or partially torn up; so we find that the plaintiff's injury was the direct result of his own carelessness in failing to look where he was driving. Plaintiff's own testimony indicates that he drove against the side of the gas pipe which he claims was negligently left protruding into the roadway, and that his buggy was overturned by striking the end of another pipe which was not left in the roadway, while most of his witnesses testify that his buggy struck the end of the pipe which protruded into the roadway. We think this conflict in the evidence is unimportant. The accident occurred in daylight and plaintiff's eyesight was not impaired. The gas pipe which he struck was lying on comparatively level ground, and had he exercised the diligence which the law and ordinary prudence calls for under the circumstances he would have seen the pipe in ample time to have driven around it.

We have not been able to find any case where the facts were precisely the same as in this one, but the following decisions announce the rule that when one traveling along a public street sees, or otherwise receives actual notice, that such street is out of repair or torn up, he must look for obstructions and other dangers and avoid them if he can do so by exercising ordinary care. [Phelan v. Paving Co., 227 Mo. 666, 1. c. 705-6; Nessler v. House Wrecking Co., 156 App. Div. (N. Y.) 348, 350; Nolan v. King, 97 N. Y. 565, 1. c. 571-2; District of Columbia v. Moulton, 182 U. S. 576.] The same rule seems to apply where a person traveling any public highway has actual knowledge of an ob-

struction therein. [Wheat v. City of St. Louis, 179 Mo. 572, 64 L. R. A. 292.]

The conclusions we have reached necessarily result in the reversal of the judgment appealed from. It is so ordered.

Walker, P. J., and Faris, J., concur.

THE STATE ex rel. CITY OF ST. LOUIS v. MISSOURI PACIFIC RAILWAY COMPANY.
Appellant.

In Banc, December 31, 1914.

1. **CITY ORDINANCE: In Conflict with Statute: Retrospective: Viaduct: Public Service Commission: Suspension of Judgment.** A city ordinance requiring a railroad company to construct a viaduct or bridge over its tracks at a street crossing, at its own expense, is in conflict with the statute permitting the Public Service Commission to apportion the costs of the viaduct between the city and the railroad company; but the statute is a later enactment, and does not have a retrospective operation, and cannot be held to nullify a suit to enforce the provisions of the ordinance prosecuted to judgment before the enactment of the statute.
2. ———: **Suspension By Statute.** Whatever rights have been acquired by a city, and whatever has been legally done under its charter and ordinances, prior to the enactment of a statute, are beyond the power of the General Assembly to disturb by such statute.
3. ———: ———: **Rights Acquired By Violation of Ordinance.** If the city ordinance is valid and binding, the railroad company cannot gain any advantage by violating it. Where it appears that, if the railroad company had obeyed the ordinance requiring it to build a viaduct in a street crossed by its tracks, the viaduct would have been almost completed before the suit was brought to compel it to obey it, the courts will not listen with patience to its prayer that, as no actual work has been done on the viaduct and the later enacted statute permits the Public Service Commission to apportion the costs between the city and the company, said apportionment should be made by the courts.

4. **VIADUCT OVER STREET: Overhead or Under Tracks: Option.** Under the charter of the city of St. Louis the Missouri Pacific Railway Company does not possess an option to cause streets to pass over or under its tracks, and mandamus will lie to compel it to obey an ordinance requiring it to construct a viaduct over its tracks crossing a public street. In ordering the abolition of a grade crossing the city proceeds under the authority of its charter, which is an exception to the general statutes pertaining to the subject.
5. **ORDINANCE: Recital of Reasons for its Enactment: Viaduct Over Street.** A legislative body need not recite the reasons which move it to enact a law. The law when enacted furnishes its own reasons. A railroad company cannot refuse to obey an ordinance requiring it at its own expense to construct a steel viaduct over its tracks at a street crossing for that the ordinance does not declare the existing grade crossing a public nuisance, or that it is dangerous, or states no reason for requiring a separation of grades at said crossing.
6. **VIADUCT AT STREET CROSSING: No Benefit District.** A railroad company is not justified in refusing to obey an ordinance of the city of St. Louis requiring it to construct at its own expense a steel viaduct over its tracks at a certain street crossing, because certain statutes intended to apply to cities of the first class require the establishment of a benefit district "to pay for the damages which may be caused to any property by reason of the construction of such subway or viaduct," and no such benefit district has been established; for, said city is not of the category of cities of the first class, but is organized under a special freeholders' charter authorized by the Constitution, and said statutes do not apply.
7. **——: Title of Street: Admitted in Return.** The title to public streets is necessarily in the city; and if defendant in its return to the writ of mandamus, commanding it to construct a viaduct over its tracks at a certain street crossing, admits that the street was at all times a public street, it will not be heard to contend that the title to the street is in it.
8. **——: Unreasonable Ordinance: Must Be Pleaded.** When a defendant wishes to avoid the provisions of an ordinance on the ground that they are unreasonable, the particular facts which render them invalid should be pleaded. A general allegation that the "ordinance is unreasonable upon its face, is unjust and oppressive, and was passed without due consideration and without affording defendant an opportunity to be heard," is not sufficient to authorize a court to hold that an ordinance requiring defendant to construct at its own expense a steel viaduct over its tracks at a street crossing is unreasonable.

9. **APPEAL:** Grounds Not Mentioned In Motion for New Trial. Constitutional objections to an ordinance set up in the answer, but omitted from defendant's motion for a new trial, will not be considered on appeal.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm*, Judge.

AFFIRMED.

James F. Green for appellant.

(1) Under the Public Service Commission law the Public Service Commission is vested with exclusive jurisdiction as to the matter of the separation of grade crossings, and, nothing having been done under said ordinance providing for the separation of grades at Chouteau avenue, this proceeding instituted by the city should be dismissed. *Elec. L. & P. Co. v. St. Louis*, 253 Mo. 592; *State ex rel. v. Gas Co.*, 254 Mo. 515; *State ex rel. v. Superior Court*, 120 Pac. 861; *State ex rel. v. Railroad*, 142 N. W. 185; *Railroad v. Spokane County* 134 Pac. 689; *Emporia v. Tel. Co.*, 133 Pac. 858. (2) The city of St. Louis can pass no ordinance which is in conflict with the Constitution, statutes or common laws of the State. Secs. 16, 20, 22, 23 and 25, Art. 9, Constitution; *City v. Hoblitzelle*, 85 Mo. 78; *St. Louis v. Dorr*, 145 Mo. 477; *St. Louis v. Kaime*, 180 Mo. 321; *St. Louis v. Meyer*, 185 Mo. 591; *St. Louis v. Klausmeier*, 213 Mo. 125; *St. Louis v. Wortman*, 213 Mo. 131; *Dillon on Mun. Corp.* (4 Ed.), p. 145; *St. Louis v. Dreisoerner*, 147 S. W. 998. (3) The granting of a writ of mandamus is largely in the discretion of the court, and should never be issued in doubtful cases. *State ex rel. v. Bridge Co.*, 206 Mo. 74; *State ex rel. v. McIntosh*, 205 Mo. 610; *State ex rel. v. Buhler*, 90 Mo. 560; *State ex rel. v. Railroad*, 77 Mo. 147; *High on Extraordinary Remedies*, sec. 9; *Merrill on Mandamus*, sec. 62; 2 *Morawetz on Private Corporations* (2 Ed.), sec. 1134; *Tipping on Mandamus*, sec.

324-327; 19 Am. & Eng. Ency. Law (2 Ed.), 751. (4) Under the charter of the city of St. Louis and the statutes of Missouri prior to the enactment of the Public Service Commission law, when it became necessary to separate grade crossings, the railway company had the right to cause the street to go under or over the railroad tracks. The ordinance arbitrarily requires the railway company to build a viaduct at its own expense, ignoring the option given by said statutes. Secs. 3049, 3141, 10626, R. S. 1909; *Van Note v. Railroad*, 70 Mo. 641; *Turner v. Railroad*, 78 Mo. 578; *Terry v. Railroad*, 89 Mo. 586; *Pratt v. Railroad*, 139 Mo. App. 511; *People v. Railroad*, 74 N. Y. 304; *Railroad v. St. Louis*, 66 Mo. 228. (5) The ordinance in controversy does not declare the crossing of Chouteau avenue with defendant's tracks a public nuisance; nor does it declare that said grade crossing is dangerous; it states no reason for requiring a separation of grades at said point. (6) The ordinance is unreasonable, because it does not require the city or the street railway company to pay any portion of the expenses incident to the construction of the viaduct, nor any portion of the consequential damages. *Bd. of Aldermen v. Railroad*, 89 N. E. 438; *In re Mayor of Taunton*, 70 N. E. 48; *Detroit v. Railroad*, 120 N. W. 603. (7) Relator seeks in this proceeding to compel the railway company to assume and pay all of the damages consequent upon the construction of the viaduct, in contravention of the statute, which requires the establishment of a benefit district "to pay for the damages which may be caused to any property by reason of the construction of such subway or viaduct and its approaches." Sec. 44, Laws 1911, p. 333; Sec. 8588, R. S. 1909.

William E. Baird for respondent.

(1) At the time of the passage of the ordinance, February 28, 1911, the city of St. Louis undoubtedly

had the power to pass the ordinance in question, and to require a railroad company to abolish grade crossings. *Tobacco Co. v. St. Louis*, 247 Mo. 374. (2) The enactment of the Public Service Commission law, approved March 17, 1913, did not nullify the ordinance in question. *Superior v. Roemer*, 154 Wis. 345; *Miller v. Railroad*, 133 Wis. 183; *Wells v. Remington*, 118 Wis. 573; *Elec. L. & P. Co. v. St. Louis*, 253 Mo. 592; *Dillon, Mun. Corps.* (5 Ed.), sec. 235; *State ex rel. v. Severance*, 55 Mo. 386; *Wills v. Railroad*, 133 Mo. App. 625; *E. St. Louis v. Maxwell*, 99 Ill. 443; *Wood v. Election Comrs.*, 58 Cal. 561; *State v. Williams*, 80 Tenn. 251. (3) While the granting of a writ of mandamus is largely in the discretion of the court, nevertheless, where the lower court has exercised its discretion and awarded the writ, the appellate court should not reverse the judgment unless it is clear that the lower court abused its discretion. *State ex inf. v. Gas Co.*, 254 Mo. 515. (4) Neither section 3049 nor section 3141, R. S. 1909, permitting a railroad to make a road or street pass under its tracks, is a grant of power to the railroad. This provision of the law merely permits the railroad to make a street or road pass under its tracks, and is not a limitation upon the power of the city. It does not give an unconditional option to the railroads. *People ex rel. v. Railroad*, 177 N. Y. 337. Sec. 8588, R. S. 1899, as amended by the Act of April 11, 1911 (Laws 1911, p. 332), refers solely to cities of the first class, and therefore does not apply to the city of St. Louis. *State ex rel. v. Mason*, 153 Mo. 52; *Kansas City v. Stegmiller*, 151 Mo. 204; *State ex rel. v. Mason*, 155 Mo. 486. (5) It was not necessary that there should have been a finding by the Municipal Assembly of the fact that the grade crossing in question constituted a nuisance, nor that there should have been a declaration to that effect by the assembly or other municipal agency, or that the railroad should have received a notice of the intention to enact the

ordinance. *Young v. City*, 47 Mo. 492; *Kiley v. Forsee*, 57 Mo. 394; *Railroad v. Maguire*, 49 Mo. 480; *Harrelson v. Railroad*, 151 Mo. 482; *Health Department v. Trinity Church*, 145 U. S. 32; *Texas v. Interstate Co.*, 155 U. S. 585. (6) The question of reasonableness of the ordinance cannot be discussed, for the reason that the point was not properly raised by the pleadings. An ordinance may, indeed, be void for unreasonableness, but the question can only be raised by a proper statement of the facts in the pleadings showing the ground of attack. *Conshohocken Borough v. Light Co.*, 29 Pa. Sup. 7; *Bradford v. Jones*, 141 Ky. 820; *Neary v. Railroad*, 41 Mont. 480; *McQuillin*, *Municipal Ordinances*, sec. 327.

BROWN, J.—Mandamus to compel the submission of plans for a public viaduct. From a judgment for plaintiff defendant appeals.

On February 28, 1911, the city of St. Louis, Missouri, through its legislative department, duly enacted an ordinance which required the defendant, at its own expense, to construct a steel viaduct and approaches thereto over defendant's railroad tracks where the same cross Chouteau avenue, a public street of said city. This ordinance will hereafter be designated as the viaduct ordinance. The length, height, materials and general description of the proposed viaduct are recited in the ordinance. It also contains the following important provisions: (1) That within four months after it becomes effective the defendant shall submit to the Board of Public Improvements of plaintiff city plans, profiles, detailed drawings and specifications for the proposed viaduct and approaches thereto. (2) That within six months after the approval of said plans, etc., by the Board of Public Improvements the defendant must begin the actual work of constructing the viaduct and complete the same within eighteen months after the work is begun; (3) The failure to

perform any of the things required by the ordinance is declared a misdemeanor punishable by fine.

The defendant failed to submit plans, etc., to the Board of Public Improvements, as required by the viaduct ordinance, and on August 10, 1911, this action of mandamus was instituted to compel defendant to submit said plans, profiles, etc., for the proposed viaduct.

In its return to the alternative writ issued herein by the circuit court, the defendant admits that Chouteau avenue is and was at the time the viaduct ordinance took effect a public street of plaintiff city used by pedestrians and vehicles, and that defendant was operating its railroad across said street. In its return defendant has set up many constitutional and other alleged grounds why the alternative writ of mandamus should be quashed and no absolute writ issued. Some of these defenses were abandoned, but such of them as are properly before us for review will receive attention in connection with the conclusions we have reached.

Stipulations which form part of the evidence upon which the case was tried admit that the defendant's railroad tracks were constructed across the land where Chouteau avenue is now located before said avenue was opened as a public street; admit that the city has not created a district within which private property would be benefited by the construction of the viaduct, and that the defendant refused and still refuses to submit plans, etc., for the construction of the viaduct to the Board of Public Improvements of plaintiff city.

The oral evidence tends to prove that defendant maintains five or six railroad tracks across Chouteau avenue where the ordinance requires the viaduct to be constructed, and that there is a double-track street railroad of the United Railways Company on the same street. Also that upon one side of said street at the point where the ordinance requires the viaduct to be

constructed there is a stoneyard, a lumberyard, a roundhouse and a six-story packing plant; and upon the other side of said street a three-story boarding house and six residences, some of them two-story buildings and others one-story.

The defendant offered to prove that the proposed viaduct would cost more than \$150,000, which evidence was objected to by plaintiff on the ground that it did not tend to prove any issue tendered by the pleadings, and on said objection was excluded. The trial resulted in a finding for plaintiff, and a judgment directing an absolute writ of mandamus as prayed. From that judgment this appeal is prosecuted.

**Motion to Dismiss:
Ordinance:
Suspension
by Statute.** I. The most difficult issue in this case arises on a motion by defendant to dismiss the cause, filed since the appeal was lodged in this court, on the ground that the Public Service Commission law, enacted by the Missouri General Assembly in 1913, is in conflict with the viaduct ordinance requiring defendant to construct the proposed viaduct and the approaches thereto, in this, that the Public Service Commission law permits said commission to apportion the costs of said viaduct between the city and the defendant, while the viaduct ordinance requires all of said expense to be borne by defendant.

It is perfectly apparent that the State law before mentioned is in conflict with the provisions of the viaduct ordinance upon which this suit is bottomed, and there is quite a respectable array of authorities which tend to support appellant's position that the viaduct ordinance was repealed by the enactment of the Public Service Commission law.

In *State ex rel. Webster v. Superior Court of King County*, 67 Wash. 37, it was held that a public service commission law of the State of Washington superseded an ordinance of the city of Seattle fixing tel-

ephone rates, and gave the commission the right to raise the rates previously fixed by city ordinance.

In *Railroad Company v. Spokane County*, 75 Wash. 72, it was held that a law of the State of Washington empowering a railroad commission to assess railroad property for purposes of taxation nullified an assessment made by officers of said county under a former law.

In *City of Emporia v. Telephone Company*, 90 Kan. 118, it was held that telephone rates fixed by a public utilities commission nullified and superseded rates previously fixed by an ordinance of the city of Emporia.

In the case of *Union Electric Light & Power Co. v. City of St. Louis*, 253 Mo. 592, it was held by the Missouri Supreme Court that an ordinance of the city enacted under the law of 1907 fixing rates to be charged for electric light was nullified by section 139 of the Public Service Commission Act of 1913, because said section effected a complete repeal of the law of 1907 and carried with it the ordinance enacted pursuant to its provisions.

In the case of *Kansas City v. Clark*, 69 Mo. 588, it was held that when a city repeals an ordinance under which a defendant has been convicted such repeal wipes out the crimes committed under the ordinance, and upon appeal a defendant charged with such crimes is entitled to his discharge.

There is no doubt that when the General Assembly enacts a law which is in irreconcilable conflict with a city ordinance theretofore enacted such ordinance is thereby repealed, but whether such a repeal nullifies acts done under a legal ordinance during the time it was in force and before the conflicting statute was passed raises a serious question. Where the power to remit fines, penalties and forfeitures accruing in favor of a city is vested in its mayor, a nice question would arise over the exercise of such power by a legislative body.

[State v. Grant, 72 Mo. 113.] But such an issue is not directly involved in this case as it is not an action for fines or penalties.

In the case of *St. Louis v. Wortman*, 213 Mo. 131, it was said by this court that the repeal of an ordinance of St. Louis city by the enactment of a State law in conflict therewith rendered it impossible to further prosecute one who had violated the repealed ordinance. In that case it was held that the ordinance upon which the prosecution was based was void because of its defective title, so that what was said about the effect of its repeal by a conflicting State statute may be treated as *obiter*.

However, notwithstanding the long array of authorities which, in some measure, tend to support the contention of appellant, we have concluded that its motion to dismiss the cause should be overruled for the following reasons:

To hold that the Public Service Commission act nullifies and wipes out the proceedings had and rights acquired under the viaduct ordinance we thus render the Public Service Commission act invalid under our organic law which expressly ordains that 'no law . . . retrospective in its operation . . . can be passed by the General Assembly.' [Sec. 15, art. 2, Constitution of Missouri.]

In the early case of *Stevens v. Andrews*, 31 Mo. 205, it was held by this court that it was not within the constitutional power of the General Assembly to suspend execution on a judgment entered before the law allowing such suspension was enacted. Certainly if the General Assembly may not suspend the enforcement of a judgment valid when entered, it cannot destroy a judgment valid under the law at the time of its entry.

In the case of *Cranor v. School Dist.*, 151 Mo. 119, it was said that a statute of limitation which would cut off or bar the right to revive a judgment already

legally entered was retrospective in its operation, and, therefore, invalid. In that case it was accordingly ruled that a statute which by its words appeared to have a retrospective effect would be construed as operating only prospectively. In the same case a well-known rule was repeated, that all laws should be construed prospectively, unless the intention to make them operate retrospectively is so clear as to leave no reasonable doubt on that subject. This last-named rule is entirely sound but need not be applied here, for the reason that there is nothing in the Public Service Commission law enacted in 1913 which in the remotest degree tends to give it a retrospective effect. The repealing clause of said act contains the following words: "The provisions of this act are not intended to repeal any law now in force, unless in direct conflict therewith, but is intended to be supplemental to such laws." [Sec. 139, Laws 1913, p. 651.]

To arrive at such an anomalous result as defendant contends for is to disregard another well-known rule of statutory construction, to-wit, that the intent of the lawmaker should govern. We have no reason for assuming that the General Assembly knew that the viaduct ordinance upon which this action is bottomed had been enacted by the city of St. Louis, much less that the action to enforce the rights acquired thereunder had been prosecuted to a judgment in the circuit court. Courts do not take judicial notice of city ordinances, and it would be an absurdity for us to hold that the General Assembly, sitting outside of the city of St. Louis, knew of the viaduct ordinance, or of said suit to enforce its provisions. Therefore, with nothing in the law indicating an intent to overturn the judgment below, we cannot read into the Public Service Commission act any such intention. It follows that the Public Service Commission law can only be held to operate prospectively.

Whether the charter provisions of the city of St. Louis in regard to the control of its streets were superseded by the Public Service Commission act is not necessarily before us, and we decline to express any opinion on that important subject at this time. However, we do hold that whatever rights were acquired by the city, and whatever was legally done under the charter of said city and the viaduct ordinance prior to the enactment of the Public Service Commission act, were beyond the power of the General Assembly to disturb.

This ruling is supported by the very recent case of *City of Superior v. Roemer*, 154 Wis. 345, in which it was held that the legislative body of Superior City having, under a right granted by the charter of said city, passed a resolution requiring certain railroads to construct at their own expense a viaduct over their tracks at Belknap street, in said city, and a copy of said resolution having been served upon the railroads before the General Assembly of Wisconsin created a public service commission, it was beyond the power of said commission to apportion any part of the costs of said viaduct to the city, for the reason that by the passage of said resolution and the service upon the railroad companies of a copy thereof the city was given a vested right to have the viaduct constructed at the expense of the railroads.

But says the appellant, as no actual work has been done under the viaduct ordinance, the Public Service Commission law should be applied so as to allow the apportionment of a part of the costs of the viaduct to the plaintiff city. This argument does not appeal to us as being sound. Defendant by its stipulations admits that it had ignored and refused to obey the provisions of said viaduct ordinance during a period of nearly twelve months following its enactment.

If the viaduct ordinance is valid, certainly a party who has violated its provisions is not entitled to gain

any advantage by such violation. If that ordinance had been obeyed the viaduct would have been well-nigh completed when this cause was instituted in the circuit court.

II. We pass not to the alleged errors of the trial court. Defendant earnestly insists that, under the general laws of Missouri (Secs. 3049, 3141 and 10626, B. S. 1909) as they existed prior to the passage of the Public Service Commission act, it possessed an option to cause streets to pass over or under its tracks, and being thus vested with an option mandamus will not lie to compel the construction of a viaduct over its tracks.

Viaduct Over
Street: Option:
Mandamus.

This issue was before us in the recent case of *American Tobacco Co. v. St. Louis*, 247 Mo. 374, l. c. 434-5-6, to which case the present defendant was a party. In that action it was held that in ordering the abolition of a grade crossing the city was proceeding under authority of its charter which formed an exception to the general statutes hereinbefore referred to. In that case pretty much the same authorities were cited by defendant as in the case at bar, so that no good will be accomplished by referring to them again in this opinion. The conclusions announced in the *American Tobacco* case met with the approval of the members of this court sitting in Banc, and we are still satisfied therewith.

III. Another assignment is as follows: "The ordinance in controversy does not declare the crossing of Chouteau avenue with defendant's tracks a public nuisance; nor does it declare that said grade crossing is dangerous; it states no reason for requiring a separation of grades at said point."

Reasons for
Ordinance.

No authorities are cited in support of this contention, nor have we found any that tend to support it. A legislative body need not recite the reasons which moved it to enact a law. The law when enacted furnishes its own reasons.

In *Young v. St. Louis*, 47 Mo. 492, it was held by this court, in substance, that the passage of an ordinance by a city was equivalent to an averment that the necessity for such ordinance had arisen. We have been unable to find any case which overrules or modifies the doctrine of the *Young* case, last cited, but we do find that it was expressly approved in *Kiley v. Forsee*, 57 Mo. 390, l. c. 394. This point will be ruled against defendant.

IV. A further contention of defendant is that "regulator seeks in this proceeding to compel the railway company to assume and pay all of the damages consequent upon the construction of the
Benefit District. viaduct, in contravention of the statute which requires the establishment of a benefit district 'to pay for the damages which may be caused to any property by reason of the construction of such subway or viaduct and its approaches.' [Sec. 44, Laws 1911, p. 333; Sec. 8588, R. S. 1909.]"

The point is also ruled against defendant, because the statutes cited show on their face that they were intended to apply to municipalities organized as cities of the first class. The plaintiff city is not in that category, being organized under a special charter as permitted by sections 16 and 20, article 9, Constitution of Missouri. [*State ex rel. Hawes v. Mason*, 153 Mo. 23, l. c. 52.]

V. In its argument at the bar of this court defendant insisted that the circuit court erred in awarding the writ of mandamus, because the fee simple title

Title to Street to the land where Chouteau avenue is located is vested in defendant. We do not think this issue is open to defendant in this appeal, for the reason that in its return (in the nature of an answer) filed below, it expressly admitted that Chouteau avenue was "at all times mentioned in plaintiff's petition a public street of plaintiff city." The title to the public streets of a city is necessarily vested in the city; therefore, the defendant could not be vested with the title thereto at the same time, and the admission before noted takes that issue out of the case.

VI. A final insistence of defendant is that "said ordinance is unreasonable, because it does not require the city or the street railway company to pay any portion of the expense incident to the construction of the viaduct, nor any portion of the consequential damages."

The only attempt on the part of defendant to present this issue in its pleadings is that part of its return which reads as follows: "Said ordinance is unreasonable upon its face, is unjust and oppressive, and was passed without due consideration and without an opportunity being afforded to the property owners interested, as well as to this respondent, to be heard before the passage thereof."

It is undoubtedly true that an ordinance which is grossly unreasonable is void. Such was the unanimous ruling of this court in *Banc in the American Tobacco Company case*, 247 Mo. 374.

However, respondent insists that the alleged unreasonableness of the viaduct ordinance was not sufficiently pleaded to enable plaintiff to meet such a defense, and, therefore, the trial court properly excluded evidence on that issue. Plaintiff cites in support of this contention the case of *Neary v. Railway Co.*, 41 Mont. 480, in which it was held that a railroad com-

pany could not introduce evidence tending to show that a speed ordinance upon which plaintiff relied to show negligence was unreasonable without pleading as a part of its defense the particular facts which rendered such ordinance unreasonable. Plaintiff also cites the following additional cases which sustain its position: *W. Conshohocken Borough v. Light & Power Co.*, 29 Pa. Sup. 7; *Bradford v. Jones*, 142 Ky. 820; and *McQuillin, Municipal Ordinances*, sec. 327, p. 510.

The ordinances of a city are presumed to be legal and reasonable, and when a litigant seeks to avoid their provisions on the ground that they are unreasonable, the particular facts which render them invalid should be pleaded.

The only evidence offered to show the unreasonableness of the viaduct ordinance was that the proposed viaduct would cost "more than \$150,000;" and even if that evidence had been admitted it alone would not have proven that the ordinance was in fact unreasonable.

If the defendant had offered evidence sufficient in quantity and quality to establish the fact that the viaduct ordinance was unreasonable, and if the trial court had received such evidence and found for defendant, quite a different issue would now be before us under the liberal provisions of our Missouri Code and Statute of Jeofails. This insistence is also ruled against defendant.

VII. In its answer defendant has urged numerous constitutional objections to the viaduct ordinance, but these defenses were abandoned in its motion for new trial, so that we are not called upon to consider them on appeal. [Shell v. Railway Co., 202 Mo. 339; *Lohmeyer v. Cordage Co.*, 214 Mo. 685, l. c. 689; *Miller v. Connor*, 250 Mo. 677, l. c. 684.]

Abandonment
of issues.

After a full consideration of all the issues in the case we are of the opinion that the plaintiff city, through the enactment of its viaduct ordinance, and the institution and prosecution of this cause to judgment in the circuit court prior to the date when the Public Service Commission law was enacted, acquired the right to have the proposed viaduct and the approaches thereto constructed by defendant at its own expense. Therefore the judgment appealed from will be affirmed.

All concur, except *Bond, J.*, who dissents.

INDEX.

ABSTRACT.

Bill of Exceptions: Record Proper: Not Commingled. Where the abstract bears after the pleadings the statement that "the following entries and matters appear of record proper," followed by orders of court, including those relating to the bill of exceptions, and then by a heading, "Bill of Exceptions," in large, black-faced capitals, preceding such matter as is usually preserved in that form, it will not be held that matter of exceptions and of record proper have been commingled. *Caruthersville v. Huffman*, 367.

ACTIONS.

1. **Amending Petition: Changing Cause of Action: Mistake in Description of Land.** Where the original petition in ejectment described the northeast fractional quarter of a section 27, it is not error to permit the plaintiff to file an amended petition describing the land sued for as the northeast fractional quarter of section 28, and after a motion to strike out the amended petition, on the ground that it is the substitution of a new cause of action and not an amendment of the cause of action stated in the original petition, is overruled and defendant stands mute, to render judgment *nil dicat* for plaintiff on said amended petition for the land described therein. *Broyles v. Eversmeyer*, 384.
2. **For Ravishment: Female's After-agreement to Keep Silent: Her Testimony.** Where there is reversible error in an instruction, a verdict for the defendant in an action for damages for ravishment will not be affirmed on the ground that the testimony of the plaintiff, who had agreed to keep silent in consideration of a payment to be made to her by the defendant, was unworthy of belief. *Wessel v. Lavender*, 421.
3. **Misjoinder: Several Causes.** The statute (Sec. 1795, R. S. 1909) provides that several causes of action may be united in the same petition, whether they be legal or equitable or both, where they arise out of the same transaction or transactions connected with the same subject of action, but the causes so united must all belong to one of the classes mentioned in the statute, and "must affect all the parties to the action." *Trefny v. Elchenseer*, 436.
4. **———: ———: Different Counts: One Against All: The Other Against Some.** Where there are two counts joined in a petition, the petition is demurrable unless each count affects all the parties to the action. Where the first count of a petition is a bill in equity seeking relief against five defendants in clearing title to real estate and preventing threatened execution sales calculated to wrongfully cloud the title, charging a conspiracy among them designed and intended

ACTIONS—Continued.

to depress the value of plaintiff's property, and to extort money from him, and asking for a trial before the chancellor, and the second count, confessedly arising out of the same transaction, asks for damages against three of the same defendants for acts done in furtherance of a malicious conspiracy to injure plaintiff, and demands a trial by jury after plaintiff's equitable relief prayed for in the first count has been granted, the petition is demurrable, in that it is violative of the statute which declares that different causes of action united in the same petition "must affect all the parties to the action." *Trefny v. Elchenseer*, 436.

5. **Injury of Employee: Emergency: Duty of Master to Procure Medical Treatment.** When an employee is engaged in a dangerous work for the master and, while in the performance of his duties, is so badly injured that he is thereby rendered physically or mentally incapable of procuring medical assistance for himself, the duty is devolved upon the master, as a matter of law, to procure such assistance for him, with reasonable diligence and in a reasonable manner, through the agency of such of his employees as may be present at the time; and a violation of that duty is negligence, for which the master must respond in damages, if there is evidence tending to show that the negligence was the proximate cause of the injured employee's death. *Hunicke v. Quarry Co.*, 560.
6. ———: ———: ———: **Basis for Rule.** Where a servant, in performing dangerous work for his master, is so badly injured as to be incapacitated to care for himself, the duty of providing medical treatment is devolved upon the master; and the rule is based upon the unexpressed humane and natural understanding existing between civilized men that wherever any one is so injured that he cannot care for himself then those who stand by and have directly or indirectly contributed to his injury owe him the duty of trying, while the emergency lasts, to alleviate his suffering or save his life, and that rule is but the application or extension of the common-law rule which requires the master to furnish his servant with a safe place in which to work and safe instrumentalities with which to perform his labor. *Ib.*

ADMINISTRATION.

Fraud: Suit to Recover Decedent's Personal Property: Cannot Be Maintained By Heirs. The heirs of decedent, so long as his widow is administratrix, cannot maintain suit to recover the value of a stock of merchandise out of which he was fraudulently cheated by defendants—not even by joining the administratrix, on her refusal to sue, as a defendant. Such suit can only be maintained by the administratrix as plaintiff; and if she refuses to sue, the remedy of the heirs is to sue on her bond, or to bring proceedings in the probate court to have her removed as administratrix and another appointed in her stead. *Toler v. Judd*, 344.

ALIEN. See **Parties to Action.**

ALLEGATA ET PROBATA. See **Practice.**

ALLEYS AND STREETS. See **Cities.**

APPEALS.

1. **Condemnation: Compensation: Appellate Practice.** Where the evidence in a condemnation proceeding was conflicting, some of the witnesses fixing defendant's benefits as equal to the value of the land taken, others fixing the amount approximately at that allowed by the jury, and still others fixing it higher, the Supreme Court cannot say that the compensation was grossly inadequate and therefore it will not interfere with the verdict. *Springfield v. Owen*, 92.
2. **Co-indictee: Testifying Without Objection.** An assignment that a co-indictee was used as a witness against defendant before a *nolle prosequi* had been entered cannot be considered on appeal, if no objection was interposed to his competency when he was offered as a witness. No objection to the competency of a witness can be considered on appeal which was not raised at the proper time in the trial court. *State v. Walls*, 105.
3. **Failure to Perfect.** From a conviction of burglary in the second degree and a former conviction of felony, defendant on April 1, 1913, was granted an appeal; on May 31, 1913, he secured an order of the trial court requiring the stenographer to furnish him a copy of the evidence as a poor person; on April 1, 1914, he filed his petition in the Supreme Court asking to be permitted to prosecute his appeal as a poor person, which motion was sustained on April 14, 1914, and on that day he filed a transcript of the record proper; on August 14, 1914, he filed a second transcript, which embraces a copy of an order showing the filing of the bill of exceptions and also a copy of the bill; this second transcript recites that the bill of exceptions was filed by the clerk of the trial court on June 10, 1914, and that the clerk's certificate to said transcript is dated July 14, 1914. The Attorney-General, on October 15, 1914, moved the court to dismiss the appeal. *Held*, that defendant having omitted to state any reason why his second amended transcript covering the bill of exceptions was not lodged within the Supreme Court in a more expeditious manner, none of his exceptions and no part of the transcript except the record proper can be considered. *State v. Moulton*, 137.
4. ———: **Filing Bill of Exceptions: Law of 1911 and Sec. 5313.** The amendment to section 2029, Revised Statutes 1909, found in Laws 1911 at page 139, does not authorize an appellant in a criminal case to file a transcript of his bill of exceptions in the Supreme Court at any time before the rules of the court require him to serve his abstract of the record upon respondent; for there is nothing in said amendment evincing any intention on the part of the General Assembly to repeal section 5313, Revised Statutes 1909, requiring appeals in criminal cases to be perfected within one year; and before a statute can be repealed there must be either a legislative design to repeal, or an irreconcilable conflict between the old and new law. *Ib.*
5. ———: ———: **Suggestion of Good Cause.** By the express words of Sec. 5313, R. S. 1909, if a defendant in a criminal case fails to perfect his appeal within one year, he may avoid the dismissal thereof when the Attorney-General has moved to dismiss, by showing to the satisfaction of the Supreme Court "good cause" for not sooner perfecting his appeal, and that right he still has since the amendment of

APPEALS—Continued.

- 1911 to section 2029, but the duty still rests on him to make a satisfactory showing that he has been unremitting in his diligence to perfect his appeal within twelve months after it was granted, and if he fails to make any showing his bill of exceptions cannot be considered. Said amendment applies to appeals in criminal cases, in so far as it permits the filing of bills of exceptions after the time granted by the trial court for filing has expired, provided such delay is not the result of appellant's own act of omission. *State v. Moulton*, 137.
6. ———: **Filing Transcript.** When a defendant in a criminal case has not obtained the permission of the Supreme Court to prosecute his appeal as a poor person until the time has expired for perfecting his appeal, he should immediately, upon obtaining such permission, tender to the clerk his transcript of the entire record, or make a satisfactory showing why he is unable to do so. *Ib.*
 7. **Criminal Case: No Brief.** Although appellant in a criminal case has filed no brief, still the Supreme Court under the statute must review the complete record. *State v. Fields*, 158.
 8. **Objections to Evidence: Exceptions.** To avail upon appeal an objection to the admission of evidence must assign a reason or ground why the evidence is objected to, and an exception must be saved to the court's action in overruling the objection. *Ib.*
 9. **Verdict: Supported by Evidence.** Before the Supreme Court will relieve on the ground that the verdict is not supported by the evidence, there must be either a total failure of the evidence, or it must be so weak that the necessary inference is that the verdict is the result of passion, prejudice, or partiality. *Ib.*
 10. ———: ———: **Wilfully Killing Hog with Intent to Steal It.** Although in a trial for wilfully killing a hog with intent to steal it, there is no direct evidence that defendant shot the hog with such intent, yet, in view of the fact that the wound in the head of the animal was about the size of a silver dollar and contained portions of paper wadding, almost entirely discrediting plaintiff's statement that, thinking the hog a squirrel, he fired a shotgun at it while he was thirty or forty feet from it, and of the further facts that soon after the shooting he answered, "Nothing, nothing," to a question from a person on the place as to what he was doing, and told the constable on the night of his arrest that "he had killed the hog, he did not aim to let his family starve," it is *held* that the evidence is sufficient to support a verdict of guilt. *Ib.*
 11. **Appellate Jurisdiction: Disagreement of Judges of Court of Appeals.** Upon a transfer of a cause from a Court of Appeals to the Supreme Court in the method prescribed by Sec. 6 of the Amendment of 1884, the latter court has complete and sole jurisdiction. *Keller v. Summers*, 324.
 12. ———: ———: **Words Used By Judge: Use of Word Decision.** It is not necessary that the judge of a Court of Appeals who deems its decision in a certain cause to be in conflict with some prior decision of the Supreme Court or another Court of

APPEALS—Continued.

Appeals, to employ any stereotyped terms to express that idea. It is not even necessary that he use the word "decision." If he in clear terms says that "to reverse the judgment in this cause would be in conflict with" certain mentioned cases either of the Supreme Court or a Court of Appeals, that is sufficient. *Ib.*

13. ———: ———: **Opinion Means Decision.** Within the meaning of Sec. 6 of the Constitutional Amendment of 1884, declaring that "when any one of said Courts of Appeals shall in any cause or proceeding render a decision which any one of the judges therein sitting shall deem contrary to any previous decision of any one of said Courts of Appeals, or of the Supreme Court," the cause shall be transferred to the Supreme Court, an opinion in which a majority of the judges of a Court of Appeals concur, is a "decision." It was the principles of law announced and adjudications made that concerned the framers of the amendment, and they are found in opinions. *Ib.*
14. ———: ———: **Whole Case.** When a cause is certified to the Supreme Court by a judge of a Court of Appeals on the ground that he deems its decision to be in conflict with some previous decision, etc., the whole case is for review, just as if it had never been considered by said Court of Appeals. *Ib.*
15. ———: ———: **Segregated Error.** The error of a verdict for punitive damages authorized by an instruction on a ground not pleaded, does not affect that part of it for actual damages, and the finding for punitive damages being capable of segregation from the rest of the verdict, the judgment will be affirmed, notwithstanding said erroneous instruction, if plaintiff will file a *remittitur* of the punitive damages. *Ib.*
16. **No Objection.** Where the question is not one calling for opinion evidence the case is not changed on appeal by the fact that expert testimony was admitted without objection. *Lyman v. Dale*, 353.
17. **Appellate Jurisdiction: Errors Corrected Sua Sponte: Re-transfer After Motion Overruled.** The Supreme Court is a court of errors, and the power to correct its own errors is self-evidently an integral part and parcel of its powers to correct the errors of other courts, and the duty to correct them in the same case at the first opportunity is always present where a ruling is sharply wrong and unsettles correct practice of the law. And especially is this true of so vital a question as jurisdiction—a question always obtruding itself *sua sponte* in any case in any court. So that where a case has been transferred to the Supreme Court by the Court of Appeals, on the ground that the amount in dispute exceeds \$7500, and a motion to retransfer on the ground of lack of jurisdiction has been overruled, although the court could undoubtedly take the question as foreclosed once for all, yet if upon further examination it appears that the motion was improvidently overruled, the case will be retransferred. *Bowles v. Troll*, 377.
18. ———: **Contest Between Guardians: Amount in Dispute.** The Supreme Court does not have appellate jurisdiction of an appeal from a judgment of a court of equity decreeing that an Iowa guardian of an insane person whose domicile is in that

APPEALS—Continued.

State is not entitled to have the administration of the Missouri guardian closed and all the assets turned over to him, where the value of her estate in this State amounts to only \$10,000. Neither guardian owns the fund in his own right; both are trustees, and she is the beneficial owner; the value of the right to the custody of the fund, in either, depends upon the perquisites, emoluments and fees of his trusteeship falling to him in administering the estate, and the value of those things is "the amount in dispute" between them, and that value cannot by any legal estimate amount to \$7500, where the assets are worth only \$10,000. *Bowles v. Troll*, 377.

19. **Public Road: Appeal from Award of Damages to One Land Owner: Rights of Another.** It is only errors that affect appellant or plaintiff in error that are reversible. On an appeal by the county in a proceeding to establish a public road, from a judgment on the issue raised by one landowner by his exceptions to the *quantum* of damages awarded him, the county cannot be heard to interpose the right of another landowner whose land was taken and who abided the report of the commissioners awarding him no damages. Such other landowner does not complain, and the county cannot complain for him. *Howell v. Jackson County*, 403.
20. ———: **Failure to File Exceptions to Commissioner's Report.** A landowner whose land is taken for a public road who fails to file exceptions to the commissioners' report awarding him no damages, cannot thereafter, if the county court had jurisdiction of all the landowners and the subject-matter, claim damages. *Ib.*
21. ———: ———: **Raised by County.** On an appeal by the county from the judgment of the circuit court awarding damages to one landowner who excepted to the award made by the commissioners and appealed from the verdict of a jury in the county court, such landowner cannot be punished because another who did not except to the report of the commissioners was awarded no damages for his land taken. The county after trial in the circuit court cannot except for the non-excepting landowner, nor compel him to come into court, and the landowner who did except is in no wise responsible for his failure to except. *Ib.*
22. ———: ———: **Not Raised Below.** Unless the point was made in the circuit court that no damages were awarded by the commissioners to a non-excepting landowner whose land was taken for the public road, it cannot be considered on appeal. *Ib.*
23. **Motion in Arrest: Erroneous Judgment.** In order to raise the point on appeal that the judgment is erroneous in that it is not responsive to the issues, there must be a motion in arrest. *Ib.*
24. **Public Road: Appeal to Circuit Court: Matters for Consideration: Judgment.** Where the county court found the road to be necessary and entered judgment establishing it, and a landowner appeals to the circuit court solely from the award of damages to him, the judgment of the county court establishing the road is not drawn in question or put in jeopardy by the appeal, and to that extent the judgment remains final, operative and self-enforcing, and it is not necessary for the

APPEALS—Continued.

judgment of the circuit court to find the jurisdictional facts upon which the location and establishment of the public road depends. *Ib.*

25. ———: ———: ———: **Affidavit for Appeal: Merits.** An affidavit for appeal by a landowner from the award of damages by the jury in the county court to him for land taken in which it is stated that he "is injured by the verdict of the jury and the judgment of the court, and this appeal is from the merits and an order and judgment taxing costs," when fairly read, means that the appeal was taken only from the verdict and judgment for damages and costs, the word "merits" being due to the statutory relation between appeals from justices' courts and from county courts. *Ib.*
26. **Objections: General.** An objection to proffered evidence that it is incompetent, irrelevant and immaterial is of no sensible use in the administration of justice, and is unavailing as an assignment of error. *Hafner Mfg. Co. v. St. Louis*, 621.
27. ———: ———: **Ordinance: Violative of Constitution and Statutes.** An objection to the admission of an ordinance in evidence to the effect that it is violative of the Constitution and laws of the State, without any designation of what provision of the Constitution or what specific law it contravenes, is too general and vague. *Ib.*
28. **Appellate Jurisdiction: Cross Appeals.** Where there are cross-appeals from the same judgment to a Court of Appeals, if either is transferable to the Supreme Court both are. *Albers v. Moffitt*, 645.
29. ———: **Injunction: No Damages.** An appeal by a merchants' exchange from a judgment enjoining it from expelling plaintiff from membership therein, wherein the petition does not show any legal basis for estimating the value of the injunction, is to the proper court of appeals, for it cannot be determined therefrom that any amount of money is in dispute. *Ib.*
30. ———: **Accounting: No Data.** A petition for an accounting, which gives no basis for a return of a definite sum of money and does not state in any way how much defendant is indebted to plaintiff, does not vest the Supreme Court with appellate jurisdiction. *Ib.*
31. **Constitutional Question: Not Passed on Below.** Only the rulings of the trial court can be reviewed on appeal. Where the trial court did not try the exceptions filed by the landowner to the commissioners' report, but, upon his motion, dismissed the proceeding on the ground that there were no statutes authorizing it and that the ordinances did not definitely fix the grade of the sidewalk, constitutional questions regarding the damages and benefits to be assessed, for and against whom they should be assessed, and the amount of land that should be embraced in the benefit district, cannot be considered by the Supreme Court on an appeal by the city. *Kirksville v. Ferguson*, 661.
32. **Appellate Jurisdiction: Amending Petition: Amount Reduced after Nonsuit and Before Appeal.** Where a plaintiff who asked \$10,000 damages took a nonsuit with leave, and

APPEALS—Continued.

after his motion to set aside the nonsuit and grant him a new trial was overruled the trial court allowed him, before taking his appeal, to amend his petition by reducing his prayer for damages from \$10,000 to \$4500, the Supreme Court, and not the Court of Appeals, has jurisdiction of his appeal. *Powers v. Railroad*, 701.

33. **Grounds Not Mentioned in Motion for New Trial.** Constitutional objections to an ordinance set up in the answer, but omitted from defendant's motion for a new trial, will not be considered on appeal. *State ex rel. v. Railroad*, 720.

ARGUMENT TO JURY. See Attorneys.**ASSAULT.**

1. **Information: Felonious Intent.** An information which, after alleging the assault was feloniously made with a shotgun, and that the shooting and striking were done feloniously, states that the assault and shooting were done "with the intent then and there him the said Herod Williams on purpose and of his malice aforethought feloniously to kill and murder," sufficiently charges felonious intent to kill by means of a firearm. *State v. Mace*, 143.
2. ———: **Shotgun: Judicial Knowledge.** The courts judicially notice the dangerous and deadly nature of a shotgun and other like firearms. But that is not true of a rock, club and some other weapons. *Ib.*
3. **Decree: Instruction.** Section 4482, Revised Statutes 1909, does not purport to include any class of assaults except those for which no punishment has been prescribed by preceding sections, and as the crime of assault with intent to kill by shooting at a human being is specifically prohibited and the punishment therefor prescribed by section 4481, it is not error to decline to instruct upon the crime of assault denounced by section 4482 where defendant is charged with the offense denounced by section 4481. *State v. Curtner*, 214.
4. **Excessive Punishment.** A verdict assessing defendant's punishment at seven years' imprisonment in the penitentiary for an unprovoked assault with intent to kill, where after a quarrel in the public road with the drunken prosecuting witness he bought shells, borrowed a shotgun, and shot him in the face, as a result of which he lost his eyesight, does not indicate such malice or prejudice on the part of the jury as authorizes a new trial. *Ib.*
5. **Assault and Battery: Self-defense: Instructions: Error Invited by Complainant.** A plaintiff in an assault case who asked and was given instructions submitting the issue of self-defense, will not be heard to contend upon appeal that that issue was wrongfully injected into the trial. *Thummel v. Surplus*, 651.
6. ———: ———: ———: **Threatening Language: Evidence.** Where, in an action for assault and battery, the defendant testified that when he alighted at the plaintiff's gate, after saying he had come to dig potatoes, the plaintiff "stepped right up and said, 'No you won't dig them,'" and that then they both drew back and struck at each other and the plaintiff

ASSAULT—Continued.

went down, the trial court did not err in instructing the jury to inquire whether the plaintiff used violent and threatening language toward the defendant, and in an angry and threatening manner and within striking distance drew back his hand to strike him. In judging whether the language was violent and threatening the jury were not confined to the tone of voice in which the words were uttered, but could take into consideration the acts and gestures accompanying it and even its culmination in immediate violence, the real question being whether it gave the defendant reasonable ground to believe, and he did believe, that the plaintiff intended to do him bodily harm. *Ib.*

ATTORNEYS.

1. **Misconduct of Prosecuting Attorney: Statement of Facts Unable to Prove: Cured By Instruction.** The misconduct of a prosecuting attorney will be weighed in connection with the facts of each case, and when the State's case is weak it will require less misconduct on the part of the prosecutor to work a reversal than where the evidence of defendant's guilt is strong. Where the assistant circuit attorney in his opening statement of the case against defendant charged with robbery, detailed to the jury certain alleged evidence of attempted bribery of the prosecuting witness, and after his failure to introduce such promised evidence, the court properly instructed the jury to disregard the statements pertaining to such attempted bribery, the evil effect of such unwarranted statement was thereby cured, the evidence of defendant's guilt being satisfactory. *State v. Levy, 181.*
2. **Remarks of Counsel: No Exception.** Appellant cannot complain if he did not except to the failure of the court to further reprimand counsel for stating as a fact something not shown by the evidence, where the court as soon as the statement was made contradicted it and said his contradiction was made in "correction of the statement of counsel." *Tawney v. United Rys. Co., 602.*
3. **Argument: Epithets not Approved: Non-prejudicial Error.** Epithets applied to a defendant by the State's attorney in his argument to the jury are not approved, but where the court is satisfied that calling the defendant a "crook" did not influence the verdict there is no ground for reversal. *State v. Baker, 689.*
4. **——: Expressing Belief in Defendant's Guilt: Non-prejudicial Error.** An expression by the State's attorney in his argument to the jury of his belief in the defendant's guilt is not approved; but such misconduct of counsel is not reversible error when the evidence clearly justified a conviction. *Ib.*

BENEFIT DISTRICT.

1. **Fixing District: Legislative Function: City Council.** The making of a benefit district is a legislative function delegated to the city council in cities of the third class. In executing this power the municipality may exercise a broad discretion, and, absent fraud, arbitrary action, or demonstrable mistake, the courts will not interfere. *Springfield v. Owen, 92.*

BENEFIT DISTRICT—Continued.

2. ———: **Property Outside City Limits: Orders of Circuit Court.** Where only the property to the north of a proposed improvement in a city of the third class was included in the benefit district fixed by the city council, that to the south being when the district was fixed outside the city limits, Sec. 9266, R. S. 1909, providing that after the filing of exceptions to the commissioners' report the court "shall thereupon make such order as right and justice may require, and may make a new appraisalment on good cause shown," does not vest the circuit court with authority to make a new benefit district and include land to the south, even though that land has in the meantime been brought within the city limits. *Springfield v. Owen*, 92.
3. **Viaduct at Street Crossing: No Benefit District.** A railroad company is not justified in refusing to obey an ordinance of the city of St. Louis requiring it to construct at its own expense a steel viaduct over its tracks at a certain street crossing, because certain statutes intended to apply to cities of the first class require the establishment of a benefit district "to pay for the damages which may be caused to any property by reason of the construction of such subway or viaduct," and no such benefit district has been established; for, said city is not of the category of cities of the first class, but is organized under a special freeholders' charter authorized by the Constitution, and said statutes do not apply. *State ex rel. v. Railroad*, 720.

BILL OF EXCEPTIONS. See *Exceptions*.

BRIDGE OVER RAILROAD TRACKS. See *Viaduct*.

CANCELLATION. See *Lands and Land Titles*, 4 and 5.

CANDIDATES FOR OFFICE, SUBSTITUTION. See *Elections*.

CERTIORARI

1. **To Court of Appeals.** On a *certiorari* to a Court of Appeals on the ground that its decision in a certain case is in conflict with the last previous decision of the Supreme Court on the subject, the case will not be considered by the Supreme Court as if it were before it on appeal. The holding must be confined to the issue; and whether or not the opinion of the respondent judges is in conflict with decisions of other courts of appeals, or some pertinent matters were not discussed, is outside the issue. *State ex rel. v. Robertson*, 535.
2. **Founded on Different Statutes.** A decision of the Court of Appeals founded on certain ordinances cannot be *held* to be in conflict with prior decisions of the Supreme Court founded on different statutes or ordinances. *Ib.*
3. ———: ———: **Contract for Sewer: Previous to Detailed Plans and Materials.** Sec. 5348, R. S. 1909, does not require a city of the third class to define by ordinance the dimensions of a district sewer and the materials out of which it is to be constructed prior to the enactment of an ordinance accepting a bid for the construction of the sewer, and hence a decision of a Court of Appeals founded on that statute and so holding, is not in conflict with a prior decision of the Supreme Court founded on an ordinance of Kansas City requiring de-

CERTIORARI—Continued.

tailed plans and specifications to be made and filed for the information of all persons desiring to bid on the work, and holding that such plans and specifications must be filed before the contract is entered into. *Ib.*

4. ———: **Erroneous Ruling.** A judgment of a Court of Appeals cannot be quashed by the Supreme Court upon *certiorari* upon the sole ground that it is erroneous and places a wrong construction upon a statute. The jurisdiction to quash must be based upon the failure of the Court of Appeals to follow the last controlling decision of the Supreme Court upon the particular issue decided by the Court of Appeals. *Ib.*
5. **Conflict in Opinions.** *Certiorari* may be used to bring to the Supreme Court a case in which a Court of Appeals has rendered an opinion in conflict with the last previous decision of the Supreme Court, whether that last decision be right or wrong. *State ex rel. v. Robertson*, 613.
6. **Local Option Law: Information: Allegation of Adoption in County.** An information, attempting to charge a violation of the Local Option Law, is not sufficient unless it charges both that the law has been adopted and is in force; nor would it be sufficient if it charged only that it had been adopted, for it may have been adopted and never put into force for lack of the necessary statutory notice. But if it charges that the law "was in full force and effect" in the county where the offense was committed, designating it by article and chapter, it charges that it had been adopted and was in force, for it could not well be in full force and effect unless it had been adopted. *Ib.*
7. ———: ———: **Conflict in Opinions.** The last previous decision of the Supreme Court, and its previous rules as well, was to the effect that an indictment or information charging a violation of the Local Option Law must charge that the law had been adopted and was in force and effect in the county; and therefore a decision of the Court of Appeals holding that an information charging that the said law was at the time the offense was committed "in full force and effect in the county" was sufficient, was not in conflict with the last previous decision of the Supreme Court on the subject, but in harmony therewith, and its said decision will be upheld upon *certiorari*. *Ib.*

CHICKENS, STEALING. See *Larceny*.

CITIES.

1. **Condemnation: Cities of Third Class: Notice: Appeal.** Where in a proceeding by a city of the third class to condemn land to widen a street the owner was served with summons, filed answer, and contested to judgment, the proceeding as to him will not be held invalid on his appeal because the record shows that the notice by publication to those owning land within the benefit district was defective. *Springfield v. Owen*, 92.
2. ———: ———: **Compensation: Appeal.** Where the evidence in a condemnation proceeding was conflicting, some of the

CITIES—Continued.

witnesses fixing defendant's benefits as equal to the value of the land taken, others fixing the amount approximately at that allowed by the jury, and still others fixing it higher, the Supreme Court cannot say that the compensation was grossly inadequate and therefore it will not interfere with the verdict. *Springfield v. Owen*, 92.

3. **Fixing Benefit District: Legislative Function: City Council.** The making of a benefit district is a legislative function delegated to the city council in cities of the third class. In executing this power the municipality may exercise a broad discretion, and, absent fraud, arbitrary action, or demonstrable mistake, the courts will not interfere. *Ib.*
4. **——: Property Outside City Limits: Orders of Circuit Court.** Where only the property to the north of a proposed improvement in a city of the third class was included in the benefit district fixed by the city council, that to the south being when the district was fixed outside the city limits, Sec. 9266, R. S. 1909, providing that after the filing of exceptions to the commissioners' report the court "shall thereupon make such order as right and justice may require, and may make a new appraisement on good cause shown," does not vest the circuit court with authority to make a new benefit district and include land to the south, even though that land has in the meantime been brought within the city limits. *Ib.*
5. **Negligence: Leading Mule Upon Public Street: Five-Foot Rein.** The leading of a mule upon a public street, with a halter rein five or six feet long, is not negligence, unless some vicious propensity of the animal be pleaded and shown; and the court should so declare as a matter of law.
Held, by LAMM, J., concurring, that it is not negligence to ride one mule and lead another along a public street unless they are halter-yoked "neck and neck;" and especially in this case, because the injury to plaintiff's buggy was caused by the mule's hind leg getting into the wheel and there is no causal connection between the injury to the wheel caused by the hind leg and the failure to halter the mules neck and neck. *Lyman v. Dale*, 353.
6. **Limitations: Streets.** Sec. 1886, R. S. 1909, providing that "nothing contained in any statute of limitation shall extend to any lands given, granted, sequestered or appropriated to any public . . . use," applies not simply to lands acquired by the public in fee, but to lands dedicated to a city for streets and alleys. *Caruthersville v. Huffman*, 367.
7. **Plat: Outlines: Construction.** In construing plats dedicating property, the courts will give effect to the plain meaning and intent exhibited by their outlines as well as by their words. *Ib.*
8. **——: Conveyance By Reference: Dedication.** Those to whom property is conveyed by reference to a plat which attempted to dedicate streets and alleys to the public, adopt the dedication by accepting the conveyance. *Ib.*
9. **——: Defective: Dedication of Streets and Alleys: Accepted by City: Adverse Possession of Alley.** Where the dedication of streets and alleys to the public by a plat of city property

CITIES—Continued.

was defective, in that there was no showing of a submission of the plat to the city council, the city by opening and improving streets indicated thereon accepted the dedication in full, and a property owner in the addition cannot acquire title to an abutting alley by adverse possession. *Ib.*

10. **Mercantile Agent: Interstate Commerce.** A mercantile agent who, as the agent of a foreign corporation, goes from house to house and obtains orders from residents for coffees, teas and groceries, and sends them to his principal in another State, which fills them by making up separate packages for each order, and sends them to said mercantile agent, who delivers them in the unbroken package to the persons who have ordered them and receives the money therefor, which he transmits to his principal, is engaged in interstate commerce; and an ordinance which seeks to punish him for engaging in such business without a license, is unenforceable as to him or others engaged in a like business. [Following *Jewel Tea Company v. Carthage*, 257 Mo. 383.] *Fleming v. Mexico*, 432.
11. **Incorporation of Town By County Court: Judicial Act.** The incorporation of a town by the county court by authority of Laws 1871, p. 85, is a judicial act. *State ex rel. v. Mining Co.*, 490.
12. ———: ———: **Cannot Be Collaterally Attacked.** An order of the county court incorporating a town by authority of Laws 1871, p. 85, cannot be collaterally attacked, as, by way of defense to an action by the State for taxes. *Ib.*
13. ———: ———: **Matters in Attack to be Pledged.** To assail an order of the county court incorporating a town or city, all essential infirmities and omissions therein must be alleged and proved with the same strictness that would be required in a bill in equity to amend a final judgment of a court of record for fraud or collusion. *Ib.*
14. **Former Adjudication: Matters Concluded: Action By State for Taxes: Incorporation of Town.** Where certain city taxes assessed against defendant's property were held invalid on the theory that the ordinance of incorporation as a city of the fourth class was unreasonable in including such property, and the original order of incorporation as a town by the county court, which also included defendant's property, was not pleaded or in issue, the judgment is not conclusive, in a subsequent suit for other taxes, of the question whether defendant's property was rightly included in the city by the county court's order of incorporation. *Ib.*
15. **Taxation: Board of Equalization: Certification of City Assessment: Yields to Land List.** While the certification of a city assessment by the county clerk, who is by statute secretary of the county board of equalization, is a sufficient authentication, yet the corrected land list of the county assessor is the original record of the equalized assessment, and the city assessment must yield to it. *Ib.*
16. ———: **City of Fourth Class: Assessment: Valuation Not to Exceed That For County Purposes.** Under Sec. 11, Art. 10, of the Constitution, declaring that the valuation of property for city taxes shall not exceed the valuation of the same

CITIES—Continued.

property for State and county purposes, and under Sec. 9347, R. S. 1909, providing that the city and county assessors shall jointly assess the property in a city of the fourth class and after the assessment has been equalized by the county board of equalization the city assessor's books shall be corrected in accordance with the changes made by the board, a levy by a city of the fourth class based on an assessment made independently and at a valuation greatly in excess of that fixed for county purposes is invalid. *State ex rel. v. Mining Co.*, 490.

17. **Contract for Sewer: Previous to Detailed Plans and Materials.** Sec. 5848, R. S. 1909, does not require a city of the third class to define by ordinance the dimensions of a district sewer, and the materials out of which it is to be constructed prior to the enactment of an ordinance accepting a bid for the construction of the sewer, and hence a decision of a Court of Appeals founded on that statute and so holding, is not in conflict with a prior decision of the Supreme Court founded on an ordinance of Kansas City requiring detailed plans and specifications to be made and filed for the information of all persons desiring to bid on the work, and holding that such plans and specifications must be filed before the contract is entered into. *State ex rel. v. Robertson*, 535.
18. **Public Wharf: Is Public Highway.** A public wharf on a navigable stream, connected with public streets and in a sense an extension of such streets, is in the eyes of the law a public highway; and the rights of the city in and its duties towards it are akin to its rights and duties towards its public streets. *Hafner Mfg. Co. v. St. Louis*, 621.
19. ———: **Forcible Entry: Removal of Obstruction.** No person has a right to the exclusive use of a tract of land owned and dedicated by the city to public use as a wharf, any more than he has a right to the exclusive use of a public street; and the city has the right, when authorized thereto by its charter and ordinances, to remove any obstructions to such general public use of the wharf tract placed thereon by one asserting an exclusive use thereto. *Ib.*
20. ———: ———: **Lawfully Possessed.** A complainant in a suit of forcible entry and detainer is bound to make proof that he was lawfully possessed of the premises and that defendant unlawfully entered into and detained the same; and "lawfully possessed" is used in the sense of "peaceable possession." But peaceable possession does not mean possession obtained by force and a strong arm, or in tortious violation of the owner's right, nor does it mean a possession that is a mere sham. *Ib.*
21. ———: ———: ———: **After Suit in Ejectment.** One cannot be said to be in lawful possession of land, after it has been adjudged by a suit in ejectment that his ancestor was not the owner, but that it was a part of a tract belonging to the city and dedicated to public use for wharf purposes, who piled lumber thereon, and then before the city undertook to remove obstructions therefrom and in contemplation thereof removed all his lumber except a few weather-stained boards and some stakes used in piling. *Ib.*

CITIES—Continued.

22. ———: ———: **Unlawful Detainer: City.** It cannot be said that a municipal corporation, which, in the exercise of its charter and ordinance right to remove obstructions from public wharfs and streets, removes a few weather-stained plank and piling stakes from a part of a tract of land which has been adjudged by suit in ejectment to belong to it and has by it been dedicated to a public wharf, has thereby "unlawfully entered into and detained" said premises. *Ib.*
23. ———: ———: ———: ———: **Improvement.** Nor is the question of complainant's lawful possession or the city's unlawful entrance affected by the fact that the city had not improved so much of the public wharf as complainant claims, but had improved the balance. *Ib.*
24. ———: ———: **Selling Complainant's Personal Property Thereon.** Nor is the action of forcible entry and detainer to be affected in any wise by the fact that the city, in the exercise of its municipal right to remove obstructions from a public wharf, in entering upon the land to remove the obstructions seized certain lumber belonging to complainant and sold it at public auction. Damages on that score cannot be awarded in such a suit. *Ib.*
25. **Sidewalk: Changing Grade: City of Third Class.** Secs. 9258 to 9275, R. S. 1909, provide in detail every step to be taken in order to assess the damages and benefits that may accrue on account of the change of the grade of a street and the construction of a sidewalk in front of abutting property. *Kirksville v. Ferguson*, 661.
26. ———: **Change in Grade.** The ordinance ordering the sidewalk to be constructed must be read in connection with the one authorizing the assessment of damages and benefits; and while it may simplify matters if the one authorizing the assessment also establishes the grade or proposed change of grade of the sidewalk, yet if the one ordering the sidewalk to be built says that the top surface of the walk to be constructed "shall, when finished, conform to the grade stakes of the city engineer now set and in place," it will not be held that the grade is so uncertain and indefinite as to authorize a dismissal of the proceeding. *Ib.*
27. ———: ———: **Removal of Stakes.** The fact that the stakes fixed by the city engineer to mark the grade of a sidewalk may be removed or destroyed and are not permanent does not authorize the court to rule that the grade of the sidewalk whose top surface is required by the ordinance to "conform when finished with the grade stakes of the city engineer now set and in place" is so indefinite and uncertain that the proceeding brought by the city to construct the sidewalk must be dismissed. The permanency of grade monuments is a matter to be addressed to the city government, and not to the courts; and their purpose is to indicate the grade line to the commissioners who assess the damages and benefits, and to inform the contractors where to place the surface of the sidewalk. *Ib.*
28. ———: **Constitutional Questions: Not Passed on Below.** Only the rulings of the trial court can be reviewed on appeal. Where the trial court did not try the exceptions filed by the landowner to the commissioners' report, but, upon his motion,

CITIES—Continued.

dismissed the proceeding on the ground that there were no statutes authorizing it and that the ordinances did not definitely fix the grade of the sidewalk, constitutional questions regarding the damages and benefits to be assessed, for and against whom they should be assessed, and the amount of land that should be embraced in the benefit district, cannot be considered by the Supreme Court on an appeal by the city. *Kirksville v. Ferguson*, 661.

29. **Negligence: Obstruction in Public Street: Knowledge.** Where a plaintiff, driving in a buggy, in broad daylight, along a public street, with actual knowledge of the existence of loose gas pipes and other temporary obstructions therein, is injured by the wheel of his buggy coming in contact therewith, he cannot recover for his resulting injuries, unless he exercised ordinary care to observe and avoid such obstructions. The rule that in driving along a public highway he had the right to assume (without looking) that said highway was free from obstructions, has no application where he had actual knowledge of such obstructions. Such actual knowledge required him to keep a diligent lookout for them. *Welch v. McGowan*, 709.
30. ———: ———: ———: **Protruding Gas Pipe: Failure to Look: Contributory Negligence.** And though the defendants were negligent in permitting the end of a large gas pipe to protrude into that part of the street left open to public travel, that did not relieve the driver of a buggy along the part left open from the duty of keeping a lookout for temporary obstructions after he observed that the street was torn up for the purpose of laying gas pipes; and if, with such knowledge, he did not look out for such protruding end, and fails to show that he could not have driven around it if he had looked and seen, his injury must be held to be the direct result of his own negligence. *Ib.*
31. **Ordinance in Conflict with Statute: Retrospective: Viaduct: Public Service Commission: Suspension of Judgment.** A city ordinance requiring a railroad company to construct a viaduct or bridge over its tracks at a street crossing, at its own expense, is in conflict with the statute permitting the Public Service Commission to apportion the costs of the viaduct between the city and the railroad company; but the statute is a later enactment, and does not have a retrospective operation, and cannot be held to nullify a suit to enforce the provisions of the ordinance prosecuted to judgment before the enactment of the statute. *State ex rel. v. Railroad*, 720.
32. ———: **Suspension by Statute.** Whatever rights have been acquired by a city, and whatever has been legally done under its charter and ordinances, prior to the enactment of a statute, are beyond the power of the General Assembly to disturb by such statute. *Ib.*
33. ———: ———: **Rights Acquired by Violation of Ordinance.** If the city ordinance is valid and binding, the railroad company cannot gain any advantage by violating it. Where it appears that, if the railroad company had obeyed the ordinance requiring it to build a viaduct in a street crossed by its tracks, the viaduct would have been almost completed before the suit was brought to compel it to obey it, the courts will not listen with patience to its prayer that, as no actual work has been done on the viaduct and the later enacted statute permits the Public Service Commission to apportion the costs between the

CITIES—Continued.

city and the company, said apportionment should be made by the courts. Ib.

34. **Viaduct Over Street: Overhead or Under Tracks: Option.** Under the charter of the city of St. Louis the Missouri Pacific Railway Company does not possess an option to cause streets to pass over or under its tracks, and mandamus will lie to compel it to construct a viaduct over its tracks crossing a public street. In ordering the abolition of a grade crossing the city proceeds under the authority of its charter, which is an exception to the general statutes pertaining to the subject. Ib.
35. **Ordinance: Recital of Reasons for Its Enactment: Viaduct Over Street.** A legislative body need not recite the reasons which move it to enact a law. The law when enacted furnishes its own reasons. A railroad company cannot refuse to obey an ordinance requiring it at its own expense to construct a steel viaduct over its tracks at a street crossing for that the ordinance does not declare the existing grade crossing a public nuisance, or that it is dangerous, or states no reason for requiring a separation of grades at said crossing. Ib.
36. **Viaduct at Street Crossing: No Benefit District.** A railroad company is not justified in refusing to obey an ordinance of the city of St. Louis requiring it to construct at its own expense a steel viaduct over its tracks at a certain street crossing, because certain statutes intended to apply to cities of the first class require the establishment of a benefit district "to pay for the damages which may be caused to any property by reason of the construction of such subway or viaduct," and no such benefit district has been established; for, said city is not of the category of cities of the first class, but is organized under a special freeholders' charter authorized by the Constitution, and said statutes do not apply. Ib.
37. ———: **Title of Street: Admitted In Return.** The title to public streets is necessarily in the city; and if defendant in its return to the writ of mandamus, commanding it to construct a viaduct over its tracks at a certain street crossing, admits that the street was at all times a public street, it will not be heard to contend that the title to the street is in it. Ib.
38. ———: **Unreasonable Ordinance: Must Be Pleaded.** When a defendant wishes to avoid the provisions of an ordinance on the ground that they are unreasonable, the particular facts which render them invalid should be pleaded. A general allegation that the "ordinance is unreasonable upon its face, is unjust and oppressive, and was passed without due consideration and without affording defendant an opportunity to be heard," is not sufficient to authorize a court to hold that an ordinance requiring defendant to construct at its own expense a steel viaduct over its tracks at a street crossing is unreasonable. Ib.

CONDEMNATION.

1. **Cities of Third Class: Notice: Appeal.** Where in a proceeding by a city of the third class to condemn land to widen a street the owner was served with summons, filed answer, and
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CONDEMNATION—Continued.

contested to judgment, the proceeding as to him will not be held invalid on his appeal because the record shows that the notice by publication to those owning land within the benefit district was defective. *Springfield v. Owen*, 92.

2. ———: **Compensation: Appeal.** Where the evidence in a condemnation proceeding was conflicting, some of the witnesses fixing defendant's benefits as equal to the value of the land taken, others fixing the amount approximately at that allowed by the jury, and still others fixing it higher, the Supreme Court cannot say that the compensation was grossly inadequate and therefore it will not interfere with the verdict. *Ib.*
3. **Fixing Benefit District: Legislative Function: City Council.** The making of a benefit district is a legislative function delegated to the city council in cities of the third class. In executing this power the municipality may exercise a broad discretion, and, absent fraud, arbitrary action or demonstrable mistake, the courts will not interfere. *Ib.*
4. ———: **Property Outside City Limits: Orders of Circuit Court.** Where only the property to the north of a proposed improvement in a city of the third class was included in the benefit district fixed by the city council, that to the south being when the district was fixed outside the city limits, Sec. 9266, R. S. 1909, providing that after the filing of exceptions to the commissioners' report the court "shall thereupon make such order as right and justice may require, and may make a new appraisalment on good cause shown," does not vest the circuit court with authority to make a new benefit district and include land to the south, even though that land has in the meantime been brought within the city limits. *Ib.*
5. **Public Road: Appeal from Award of Damages to One Land Owner: Rights of Another.** It is only errors that affect appellant or plaintiff in error that are reversible. On an appeal by the county in a proceeding to establish a public road, from a judgment on the issue raised by one landowner by his exceptions to the *quantum* of damages awarded him, the county cannot be heard to interpose the right of another landowner whose land was taken and abided the report of the commissioners awarding him no damages. Such other landowner does not complain, and the county cannot complain for him. *Howell v. Jackson County*, 403.
6. ———: **Failure to File Exceptions to Commissioners' Report.** A landowner whose land is taken for a public road who fails to file exceptions to the commissioners' report awarding him no damages, cannot thereafter, if the county court had jurisdiction of all the landowners and the subject-matter, claim damages. *Ib.*
7. ———: ———: **Raised by County.** On an appeal by the county from the judgment of the circuit court awarding damages to one landowner who excepted to the award made by the commissioners and appealed from the verdict of a jury in the county court, such landowner cannot be punished because another who did not except to the report of the commissioners was awarded no damages for his land taken. The county after trial in the circuit court cannot except for the non-excepting landowner, nor compel him to come into court, and the landowner who did except is in no wise responsible for his failure to except. *Ib.*

CONDEMNATION—Continued.

8. ———: ———: Not Raised Below. Unless the point was made in the circuit court that no damages were awarded by the commissioners to a non-excepting landowner whose land was taken for the public road, it cannot be considered on appeal. *Ib.*
9. ———: Appeal to Circuit Court: Matters for Consideration: Judgment. Where the county court found the road to be necessary and entered judgment establishing it, and a landowner appeals to the circuit court solely from the award of damages to him, the judgment of the county court establishing the road is not drawn in question or put in jeopardy by the appeal, and to that extent the judgment remains final, operative and self-enforcing, and it is not necessary for the judgment of the circuit court to find the jurisdictional facts upon which the location and establishment of the public road depends. *Ib.*
10. ———: ———: ———: Affidavit for Appeal: Merits. An affidavit for appeal by a landowner from the award of damages by the jury in the county court to him for land taken in which it is stated that he "is injured by the verdict of the jury and the judgment of the court, and this appeal is from the merits and an order and judgment taxing costs," when fairly read, means that the appeal was taken only from the verdict and judgment for damages and costs, the word "merits" being due to the statutory relation between appeals from justices' courts and from county courts. *Ib.*
11. ———: ———: Liability of County for Damages. When the county court has found the proposed road to be of sufficient public utility to warrant its establishment at the expense of the county, has caused it to be opened and has taken possession, the county thereby becomes irrevocably bound, by its own election, to pay the damages assessed in the circuit court in favor of a landowner whose property was taken for the road and who excepted to the commissioners' award and to the verdict of the jury in the county court, and appealed to the circuit court on the issue of the amount of damages alone. *Ib.*
12. ———: Measure of Damages: Fences: Twice Added. In estimating the damages to a landowner caused by constructing a public road through his land, the jury may be instructed that, in estimating his damages, they may take into consideration the cost of building a new fence, when such fence is necessary; but they should not be told to "consider the quantity and value of the land taken for the road, and also the cost of building the necessary fences along said road, and damage to the whole tract of land of which that taken forms a part, and from the sum of these deduct the benefits peculiar to such tract;" for that is, in effect, by loose language, to tell them to add the cost of the fence to the sum of the value of the land taken and damage to that not taken, when, in fact, the cost of fencing is but one of the elements that go to swell the owner's damage. *Ib.*
13. ———: ———: ———: ———: Error Corrected on Appeal. Where the verdict is swollen by a definitely ascertained and segregated erroneous amount, the false item may be eliminated by excision, by requiring a *remittitur*. Where the instruction

CONDEMNATION—Continued.

authorized the jury to return a verdict for the value of constructing a fence made necessary by the establishment of a public road, in addition to the value of the land taken and damage to that not taken, and all the witnesses agree on the cost of such a fence, that cost will be deducted from the gross amount of the verdict for damages, as a condition of affirmance. *Howell v. Jackson County*, 403.

CONSPIRACY.

1. **To Locate Drainage Ditch.** A conspiracy between the members of the board of supervisors to locate the drainage canal in such a way as to favor the interests of themselves and of other landowners, which the evidence shows failed of its purpose, the result being that the ditch was not located where they desired it located, will not authorize a decree enjoining the construction and maintenance of the ditch. *Carder v. Drainage District*, 542.
2. ———: **Barren of Results.** A barren and abandoned conspiracy, sounding in words but void of substance in either acts or results, is not actionable, unless there is a statute making it actionable. *Ib.*
3. ———: **Power to Restrain by Injunction.** Whether or not an alleged conspiracy formed between the supervisors after the district has been organized, to locate the drainage canal in a way to benefit most largely their own lands to the injury of others, will authorize a decree enjoining the construction and maintenance of the ditch, will not be decided where the evidence affirmatively shows that such conspiracy, if it ever existed, was barren of results. But it would seem that Secs. 5514, 5515, 5518a, R. S. 1909, make it unnecessary to resort to the extraordinary remedy by injunction, though that is not decided. *Ib.*

CONSTITUTIONAL LAW.

1. **Election: Coalition of Parties: Printing Names on Different Tickets.** The Act of 1913, prohibiting party fusion and denying to a candidate of one political party the right to have his name also printed on the party ticket of another political party as its candidate for the same office, having been held unconstitutional (261 Mo. 515), the county clerk has no power to refuse to print the name of a candidate for Representative upon the tickets of two political parties, where he has been nominated at a primary election by one of such parties, and substituted by the county committee of the other in the stead of its own candidate for the same office who has resigned. The statutes as they now stand do not prohibit a man from being the candidate of two political parties.
Held, by GRAVES, J., dissenting, with whom WOODSON, J., concurs, that the Act of 1913 prohibiting fusion of political parties, is not unconstitutional, as held in *State ex rel. Schmoll v. Drabelle*, and whether it received the number of votes required by the Constitution was a question for the legislative body to determine, and that act being valid the peremptory writ of mandamus should be denied. *State ex rel. v. Seibel*, 220.
2. ———: **Candidates: Payment of Filing Fee.** *Held*, by BROWN, J., that a county clerk cannot refuse to print the

CONSTITUTIONAL LAW—Continued.

name of a candidate for office on the party ticket on the sole ground that he had not paid the filing fee to the committee treasurer required by Sec. 5879, R. S. 1909. Said requirement is violative of the constitutional provision (Art. 2, sec. 9) ordaining that "all elections shall be free and open." That provision applies to both candidates and voters. Such a statute is against sound public policy. *Ib.*

3. **Taxation: Constitutional Question: Elk's Club Rooms Not Exempt.** Premises owned by the Benevolent and Protective Order of Elks, and used for the entertainment and refreshment of the members and their guests, are not exempt from taxation under the provisions of Sec. 6, Art. 10, of the Constitution, exempting lots used exclusively for purposes purely charitable. *B. P. O. E. v. Koeln*, 444.
4. **Taxation: City of Fourth Class: Assessment: Valuation Not to Exceed That For County Purposes.** Under Sec. 11, Art. 10, of the Constitution, declaring that the valuation of property for city taxes shall not exceed the valuation of the same property for State and county purposes, and under Sec. 9347, R. S. 1909, providing that the city and county assessors shall jointly assess the property in a city of the fourth class and after the assessment has been equalized by the county board of equalization the city assessor's books shall be corrected in accordance with the changes made by the board, a levy by a city of the fourth class based on an assessment made independently and at a valuation greatly in excess of that fixed for county purposes is invalid. *State ex rel. v. Mining Co.*, 490.
5. **Constitutional Statute: Railroad: Discrimination in Passenger Fares: National Guard.** The National Guard when traveling on orders from the Governor travel at the expense of the State, and a statute which requires them to be carried at one cent a mile is a discrimination in favor of the State, and not one between "transportation companies and individuals;" and, therefore, said statute is not violative of Sec. 23 of Art. 12 of the Constitution, which declares that "no discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback or otherwise," since such constitutional provision does not apply. *State v. M. K. & T. Ry. Co.*, 507.
6. ———: ———: ———: ———: **One Cent Fare:** Sec. 14 of Art. 12: **A Command is an Implied Inhibition.** A statute (Sec. 8396, R. S. 1909) which requires railroad companies to carry members of the organized militia, traveling on the order of the Governor, at one cent per mile, while they are authorized to charge all private individuals and other officers of the State two cents per mile, is violative of Sec. 14 of Art. 12 of the Constitution of Missouri, which declares that "the General Assembly shall pass laws to correct the abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads of this State." That provision not only lays upon the Legislature the duty to do an express thing, but it lays upon it an inhibition not to do a diametrically opposite thing. The command being that the Legislature shall enact laws to prevent unjust discrimination, that command forbids the Legislature to enact laws whose effect is to produce a plain discrimination.

CONSTITUTIONAL LAW—Continued.

Held, by GRAVES, J., concurring, that Sec. 14 of Art. 12 is not the only provision of the Constitution which authorizes the Legislature to fix maximum passenger or freight rates; on the contrary, rate-making is a legislative matter, and the constitutional provision (article III) vesting the legislative power in the General Assembly gave full power to the Legislature to pass laws fixing maximum railroad rates of all kinds. *State v. M., K. & T. Ry. Co.*, 507.

7. ———: **Discrimination in Favor of State.** Said constitutional provision applies to a statute which makes an unjust discrimination in favor of the State. Nothing in its alleged sovereignty or in the fact that by its Constitution railroads are declared to be "public highways," will serve to absolve the State from the application to it of its own Constitution and statutes. The constitutional provision forbidding unjust discrimination in passenger and freight rates is binding upon the State, and a statute which attempts to make such discrimination in favor of the State is invalid. *Ib.*
8. ———: ———: **Unjust: Arbitrary.** The mere fact that a legislative act fixes a difference in passenger rates does not necessarily constitute an unjust discrimination. If the difference in rates be based upon a reasonable and fair difference in conditions which equitably and reasonably justify a different rate, it is not an unjust discrimination. But a legislative act which requires railroads to carry members of the National Guard to attend target practice, or upon other military duty, at the order of the Governor, upon regular trains, without regard to number, at any hour of the day or night, and to give them all the privileges accorded to other passengers, but at one-half the price fixed by law for carrying others, prescribes an arbitrary and unjust discrimination, and is violative of Sec. 14 of Art. 12 of the Constitution. *Ib.*
9. ———: ———: **Rates Fixed By General Act Presumed to Be Reasonable.** A rate of two cents per mile for carrying all adult passengers, fixed by a statute enacted only a short time before a special act declaring the rate for carrying members of the National Guard shall be one cent, is prima-facie reasonable, and will be so held when the question of whether the one-cent rate fixed by the later act is an unjust discrimination is up for determination. *Ib.*
10. ———: ———: **As Affected By Public Utilities Act: Obiter.** Courts do not determine questions which are not live issues and whose determination is not necessary for a proper disposition of the case in hand. Having reached the conclusion that the statute requiring railroad companies to carry members of the National Guard when on military duty at one cent per mile establishes an unjust discrimination and is therefore void, it is not necessary to determine whether under the Public Utilities Act of 1913 the Public Service Commission is given power to fix railroad passenger rates, or if it has been given such power it was an unconstitutional delegation of legislative power.
Held, by GRAVES, J., that the question of the power of the Public Service Commission to fix passenger and freight rates which railroads may charge is involved in this case and should be decided now. *Ib.*
11. **No Objection to Ordinance: Violative of Constitution and Statutes.** An objection to the admission of an ordinance in

CONSTITUTIONAL LAW—Continued.

evidence to the effect that it is violative of the Constitution and laws of the State, without any designation of what provision of the Constitution or what specific law it contravenes, is too general and vague. *Hafner Mfg. Co. v. St. Louis*, 621.

12. **Constitutional Questions: Not Passed on Below.** Only the rulings of the trial court can be reviewed on appeal. Where the trial court did not try the exceptions filed by the landowner to the commissioners' report, but, upon his motion, dismissed the proceeding on the ground that there were no statutes authorizing it and that the ordinances did not definitely fix the grade of the sidewalk, constitutional questions regarding the damages and benefits to be assessed, for and against whom they should be assessed, and the amount of land that should be embraced in the benefit district, cannot be considered by the Supreme Court on an appeal by the city. *Kirksville v. Ferguson*, 661.
13. **Appeal: Grounds Not Mentioned in Motion for New Trial.** Constitutional objections to an ordinance set up in the answer, but omitted from defendant's motion for a new trial, will not be considered on appeal. *State ex rel. v. Railroad*, 720.

CONTRACTS.

Cancellation: Specific Performance: Fraud: Mutuality. A widow and two children, Sarah and Noel, survived John F. Gilbirds, who died intestate seized of the legal title to 840 acres of land heavily encumbered. Sarah sued to enforce an alleged oral agreement to partition, and appealed to the Supreme Court from a decree vesting the title to all the land in the widow, her mother. The widow thereafter executed a deed to a trustee, which empowered him to manage the property, or if need be sell any part of it, for the purpose of paying off the incumbrances, together with debts of the grantor amounting to over \$1800, the remainder to go to her for life and then in fee to her son and his wife. At about the same time she contracted to sell a portion of the land, and when she found she could not perfect title on account of Sarah's pending appeal in the partition suit, she entered into a contract with Sarah and her husband, dated April 28, 1909, by which it was agreed that the trustee should convey to the widow for life, with remainder in Sarah; that Sarah should dismiss her appeal in the partition suit; that the proceeds of a sale of 334 acres, for which all parties agreed to make deeds, should go to pay the widow's debts and reduce the incumbrances; that the widow should, for her life, lease the remainder to Sarah and her husband for \$300 a year, the lessees to pay all taxes and insurance; and that the lessees should have the right to sell, "as soon as practicable and on the best terms obtainable," all or any portion of the premises to further reduce the incumbrances, the widow agreeing to join in all deeds necessary to carry out any such contract of sale. Sarah's appeal was dismissed and the provisions of the contract were carried out, until Sarah's husband, in July, 1910, made a contract, which Sarah afterwards ratified, for the sale of sixty-four acres of the remaining land, whereupon the widow refused to join in a deed. To a suit for specific performance brought by Sarah, her husband and the contracting purchaser, the widow answered asking that the contract of April, 1909, be cancelled as unconscionable, not sup-

CONTRACTS—Continued.

ported by valid consideration, and procured by false representations. She testified that, to induce her to sign, her daughter told her the \$300 a year rent was a mere form—that she should never want. The evidence shows that the income from the premises was only about \$865 a year, which left very little in the hands of Sarah and her husband after they made the payments specified in the contract of 1909.

Held, that, in view of all the facts, the trial court's refusal to cancel the contract of 1909 must be upheld, especially since there is no showing in the record that Sarah's appeal in the partition suit was other than meritorious, or that she refused or failed to carry out her promise to provide additional support for her mother.

Held, also that, since the contract of 1910, which must be considered together with that of 1909, definitely fixed the price and described the land; was mutual as regards the widow and the purchaser; was a sale "as soon as practicable and on the best terms obtainable," and was ratified by Sarah, the trial court was right in decreeing that the widow should perform specifically by joining in a deed to the purchaser. *Forgey v. Gilbirds*, 44.

CONVEYANCES.

1. **Testamentary Deed.** A deed which expressly reserves a life estate in the grantor, and conveys at the same time, by words of present import, a vested remainder in the property to the grantees, is not a mere attempt to convey the title by an instrument in the nature of a last will and testament, but is in legal effect a present conveyance of a fixed right, namely, a vested title in fee. *Priest v. McFarland*, 229.
2. **Plat: Outlines: Construction.** In construing plats dedicating property, the courts will give effect to the plain meaning and intent exhibited by their outlines as well as by their words. *Caruthersville v. Huffman*, 367.
3. ———: **Conveyance By Reference: Dedication.** Those to whom property is conveyed by reference to a plat which attempted to dedicate streets and alleys to the public, adopt the dedication by accepting the conveyances. *Ib.*
4. ———: **Defective: Dedication of Streets and Alleys: Accepted by City: Adverse Possession of Alley.** Where the dedication of streets and alleys to the public by a plat of city property was defective, in that there was no showing of a submission of the plat to the city council, the city by opening and improving streets indicated thereon accepted the dedication in full, and a property owner in the addition cannot acquire title to an abutting alley by adverse possession. *Ib.*
5. **Tax Deed: Necessary Recitals: Sale by Collector Under Act of March 30, 1872.** The Act of March 30, 1872, provided for a special term of the county court in July of each year for the enforcement of tax liens against realty, but also provided that the collector might apply to a subsequent regular term if for any good cause he could not obtain judgment at the special term. *Held*, that a collector's deed reciting proceedings and judgment of sale for taxes at the October term, 1872, without any showing of cause for application to that term, is invalid. [There is, furthermore, no showing in this case, either in the

CONVEYANCES—Continued.

deed or elsewhere that the requisite notice of the day of sale or of the intended application to the October term was given by the collector.] *Seaman v. Hellman*, 658.

CORPORATIONS.

1. **Formation: Partnership Relation Between Organizers: Must be Established by Proof.** Promoters of a corporation are not prima-facie partners. Their partnership must be established by proof. *Ringolsky v. Mining Co.*, 241.
2. ———: ———: ———: **Evidence.** Where R, T, and G, with others, formed a corporation, each putting in mining property and taking in return stock and bonds of the corporation, evidence *held* not to show that R and T were partners. *Ib.*
3. ———: **Promoters: Secret Profits.** T, G, and G's associates owned four mines. In May, 1905, the plaintiff and M. I. bought an interest in two of the mines, and on July 9, 1905, G offered to sell his interest and that of his associates to the plaintiff and T for \$257,000. They agreed to buy, and a week later the plaintiff, with T and M. I., drew up a contract providing for the formation of a corporation to take over the mines, M. I. to advance \$50,000 and to hold stock as security until G was fully paid, the plaintiff and T to transfer to the corporation all their interest in the mines. T was to receive one-half, and the plaintiff and M. I. each one-fourth of the issued stock. In August, 1905, the plaintiff, G, and M. I., with M. I.'s associates, Bendet Isaacs, Adolph Eliasberg and the two Rosenwassers, entered into an agreement to form the corporation with a capital stock of 2,500,000 shares, par value \$1 each. M. I., the Rosenwassers, and Eliasberg were to pay G an additional \$50,000, and for the \$100,000 total thus paid they were to receive 1,000,000 in bonds and 500,000 shares of stock in the new corporation. Bendet Isaacs was to pay \$33,333.33 into the treasury and receive the same amount in bonds and 166,666 shares of stock, the stock to be taken out of the holdings of the plaintiff and T. For the additional \$157,000 due him G agreed to take \$100,000 in bonds, a vendor's lien for \$57,000 and 100,000 shares of stock, the bonds to be the first paid by the company and the earnings to be applied to paying off the vendor's lien. T did not sign this agreement, and when in September, 1905, he made several objections to its consummation in that form certain concessions were made to him, and finally G told him he believed the stock he (T) would get would be worth as much as his (G's) bonds, and agreed to let him, at any time he might wish, take a part of the bonds in exchange for a proportionate share of T's stock. With this understanding between them, undisclosed to the others, the agreement was closed substantially on the contract basis. Afterwards there was drawn and signed a declaration of trust, wherein it was declared that G and T jointly owned the stock and bonds acquired by each. Later both G and T disposed of all their stock and bonds to another corporation. *Held*, in plaintiff's suit for secret profits alleged to have accrued to T by reason of his undisclosed agreement with G, that there can be no recovery, even assuming that T was a promoter and that the plaintiff has the right to sue on behalf of the company after parting with his stock. *Ib.*

COSTS OF PUBLIC WORKS. See **Property Rights.**

COUNTIES.

Public Road: Liability of County for Damages. When the county court has found the proposed road to be of sufficient public utility to warrant its establishment at the expense of the county, has caused it to be opened and has taken possession, the county thereby becomes irrevocably bound, by its own election, to pay the damages assessed in the circuit court in favor of a landowner whose property was taken for the road and who excepted to the commissioners' award and to the verdict of the jury in the county court, and appealed to the circuit court on the issue of the amount of damages alone. *Howell v. Jackson County*, 403.

COUNTY CLERK.

Party Candidates: Politics of Candidate: Not Question for County Clerk. It is not for the county clerk to determine that the attempted substitution upon its party ticket of a candidate of another party for the same office, by the county committee, in the stead of its own nominee who has resigned, is in violation of Sec. 5848, R. S. 1909, providing that "no committee shall have the power to substitute, to fill any vacancy, the name of any person who is not known to be of the same political belief and party as the person for whom he is substituted." That section lays a duty upon the party committee, but it lays none on the county clerk, and it does not authorize him to exercise the judicial function of saying that the person substituted is known not to be of the same political belief and party as the person for whom he is substituted. *State ex rel. v. Seibel*, 220.

COURT OF APPEALS.

1. **Appellate Jurisdiction: Disagreement of Judges of Court of Appeals.** Upon a transfer of a cause from a Court of Appeals to the Supreme Court in the method prescribed by Sec. 6 of the Amendment of 1884, the latter court has complete and sole jurisdiction. *Keller v. Summers*, 324.
2. ———: ———: **Words Used by Judge: Use of Word Decision.** It is not necessary that the judge of a Court of Appeals who deems its decision in a certain cause to be in conflict with some prior decision of the Supreme Court or another Court of Appeals, to employ any stereotyped terms to express that idea. It is not even necessary that he use the word "decision." If he in clear terms says that "to reverse the judgment in this cause would be in conflict with" certain mentioned cases either of the Supreme Court or a Court of Appeals, that is sufficient. *Ib.*
3. ———: ———: **Opinion Means Decision.** Within the meaning of Sec. 6 of the Constitutional Amendment of 1884, declaring that "when any one of said Courts of Appeals shall in any cause or proceeding render a decision which any one of the judges therein sitting shall deem contrary to any previous decision of any one of said Courts of Appeals, or of the Supreme Court," the cause shall be transferred to the Supreme Court, an opinion in which a majority of the judges of a Court of Appeals concur, is a "decision." It was the principles of law announced and adjudications made that concerned the framers of the amendment, and they are found in opinions. *Ib.*

COURT OF APPEALS—Continued.

4. ———: ———: **Whole Case.** When a cause is certified to the Supreme Court by a judge of a Court of Appeals on the ground that he deems its decision to be in conflict with some previous decision, etc., the whole case is for review, just as if it had never been considered by said Court of Appeals. *Ib.*
5. **Certiorari: To Court of Appeals.** On a *certiorari* to a Court of Appeals on the ground that its decision in a certain case is in conflict with the last previous decision of the Supreme Court on the subject, the case will not be considered by the Supreme Court as if it were before it on appeal. The holding must be confined to the issue; and whether or not the opinion of the respondent judges is in conflict with decisions of other courts of appeals, or some pertinent matters were not discussed, is outside the issue. *State ex rel. v. Robertson*, 535.
6. ———: ———: **Founded on Different Statutes.** A decision of the Court of Appeals founded on certain ordinances cannot be *held* to be in conflict with prior decisions of the Supreme Court founded on different statutes or ordinances. *Ib.*
7. ———: ———: ———: **Contract for Sewer: Previous to Detailed Plans and Materials.** Sec. 5848, R. S. 1909, does not require a city of the third class to define by ordinance the dimensions of a district sewer and the materials out of which it is to be constructed prior to the enactment of an ordinance accepting a bid for the construction of the sewer, and hence a decision of a Court of Appeals founded on that statute and so holding, is not in conflict with a prior decision of the Supreme Court founded on an ordinance of Kansas City requiring detailed plans and specifications to be made and filed for the information of all persons desiring to bid on the work, and holding that such plans and specifications must be filed before the contract is entered into. *Ib.*
8. ———: ———: **Erroneous Ruling.** A judgment of a Court of Appeals cannot be quashed by the Supreme Court upon *certiorari* upon the sole ground that it is erroneous and places a wrong construction upon a statute. The jurisdiction to quash must be based upon the failure of the Court of Appeals to follow the last controlling decision of the Supreme Court upon the particular issue decided by the Court of Appeals. *Ib.*
9. ———: **Conflict in Opinions.** *Certiorari* may be used to bring to the Supreme Court a case in which a Court of Appeals has rendered an opinion in conflict with the last previous decision of the Supreme Court, whether that last decision be right or wrong. *State ex rel. v. Robertson*, 613.
10. **Local Option Law: Information: Allegation of Adoption in County.** An information, attempting to charge a violation of the Local Option Law, is not sufficient unless it charges both that the law has been adopted and is in force; nor would it be sufficient if it charged only that it had been adopted, for it may have been adopted and never put into force for lack of the necessary statutory notice. But if it charges that the law "was in full force and effect" in the county where the offense was committed, designating it by article and chapter, it charges that it had been adopted and was in force, for it could not well be in full force and effect unless it had been adopted. *Ib.*

COURT OF APPEALS—Continued.

11. ———: ———: **Conflict in Opinions: Certiorari.** The last previous decision of the Supreme Court, and its previous rules as well, was to the effect that an indictment or information charging a violation of the Local Option Law must charge that the law had been adopted and was in force and effect in the county; and therefore a decision of the Court of Appeals holding that an information charging that the said law was at the time the offense was committed "in full force and effect in the county" was sufficient, was not in conflict with the last previous decision of the Supreme Court on the subject, but in harmony therewith, and its said decision will be upheld upon *certiorari*. State ex rel. v. Robertson, 613.

CRIMINAL LAW.

1. **Coindicttee: Testifying Without Objection.** An assignment that a co-indicttee was used as a witness against defendant before a *nolle prosequi* had been entered cannot be considered on appeal, if no objection was interposed to his competency when he was offered as a witness. No objection to the competency of a witness can be considered on appeal which was not raised at the proper time in the trial court. State v. Walls, 105.
2. **Instructions: Stealing Chickens: Definition of Grand Larceny.** An instruction defining grand larceny which omits the fact that the chickens must have been taken in the nighttime to have constituted grand larceny, is immaterial and harmless, if the words "grand larceny" do not appear in any other instruction, and the jury were not required to find the defendant guilty of grand larceny, and the only issue under the evidence was whether defendant stole the chickens, and that issue was presented in a proper instruction. Ib.
3. **Conviction: On Evidence of Accomplice.** A defendant may be convicted of stealing chickens in the nighttime upon the testimony of an accomplice. Ib.
4. **Exhibiting Dangerous Weapon: "Exhibit:" Instructions.** The word "exhibit" as used in an instruction defining the offense of exhibiting a dangerous weapon in a rude, angry, and threatening manner is not of technical import; it is a plain English word that needs no definition. State v. Nichols, 113.
5. ———: **Evidence: Question for Jury.** Evidence in a trial for exhibiting a pistol in a rude, angry, and threatening manner in the presence of others held to justify a submission of the case to the jury. Ib.
6. **Larceny: Instruction: No Felonious Intent: Steal.** An instruction setting forth the elements of larceny, which omits the words "with a felonious intent," or words of equivalent meaning, is erroneous. At common law a felonious intent was a constituent element of larceny, and by statute the common law is in force in this State and is the only rule of decision until it has been abrogated or changed by statute, and for at least ninety years the statute concerning larceny has contained the words "feloniously steal, take and carry away," etc. State v. Rader, 117.
7. ———: ———: ———: **Words of Equivalent Meaning: Steal.** Larceny is an exception to the general rule, which

CRIMINAL LAW—Continued.

is that the words "felonious" and "feloniously" need not be used in an instruction, and if used they need not be defined. An instruction for grand larceny ought to require the trial jury to find that the taking was with a felonious intent, but the specific use of the word "felonious" or "feloniously" is not absolutely necessary. Words of equivalent meaning may be used in stead; but the word "steal" is not an equivalent. *Held*, by WALKER, J., that where the instruction contains the words "unlawfully steal, take and carry away" the words "with felonious intent" are not only not necessary, but their use would be both redundant and tautological. *Ib*.

8. ———: ———: ———: **Accessory.** Defendant, while confined in calaboose for a misdemeanor, hired Bell to feed and attend to his horses kept in a barn. The feed running short, defendant directed Bell to go to a neighbor's barn and get corn and alfalfa. Bell did so, committing grand larceny, and concealed the articles in defendant's barn. Bell at first denied that defendant was connected with the larceny, but later confessed, and testified he stole the corn and alfalfa at defendant's direction and procurement; defendant testified that he directed Bell to buy the feed, not to steal it. The case is close upon its facts. *Held*, that defendant was entitled to a specific instruction requiring the jury to find that defendant, in the alleged procurement of said Bell to commit the larceny charged, acted with a felonious intent. An accessory before the fact must in all cases act with a criminal intent, and where the crime charged is grand larceny he must have acted with a felonious intent. *Ib*.
9. **Instructions: Assumption of Larceny: Accessory.** Where defendant is being tried as an accessory to a grand larceny committed by Bell, and Bell swears he did steal the things charged, and defendant does not deny or controvert the theft, but denies his guilty connection therewith, it is not error for the State's instructions to assume that Bell stole the things. *Ib*.
10. **Appeal: Failure to Perfect.** From a conviction of burglary in the second degree, and a former conviction of felony, defendant on April 1, 1913, was granted an appeal; on May 31, 1913, he secured an order of the trial court requiring the stenographer to furnish him a copy of the evidence as a poor person; on April 1, 1914, he filed his petition in the Supreme Court asking to be permitted to prosecute his appeal as a poor person, which motion was sustained on April 14, 1914, and on that day he filed a transcript of the record proper; on August 14, 1914, he filed a second transcript, which embraces a copy of an order showing the filing of the bill of exceptions and also a copy of the bill; this second transcript recites that the bill of exceptions was filed by the clerk of the trial court on June 10, 1914, and that the clerk's certificate to said transcript is dated July 14, 1914. The Attorney-General, on October 15, 1914, moved the court to dismiss the appeal. *Held*, that defendant having omitted to state any reason why his second amended transcript covering the bill of exceptions was not lodged within the Supreme Court in a more expeditious manner, none of his exceptions and no part of the transcript except the record proper can be considered. *State v. Moulton*, 137.
11. ———: ———: **Filing Bill of Exceptions: Law of 1911 and Sec. 5313.** The amendment to section 2029, Revised

CRIMINAL LAW—Continued.

Statutes 1909, found in Laws 1911 at page 139, does not authorize an appellant in a criminal case to file a transcript of his bill of exceptions in the Supreme Court at any time before the rules of the court require him to serve his abstract of the record upon respondent; for there is nothing in said amendment evincing any intention on the part of the General Assembly to repeal section 5313, Revised Statutes 1909, requiring appeals in criminal cases to be perfected within one year; and before a statute can be repealed there must be either a legislative design to repeal, or an irreconcilable conflict between the old and new law. *State v. Moulton*, 137.

12. ———: ———: ———: **Suggestion of Good Cause.** By the express words of Sec. 5313, R. S. 1909, if a defendant in a criminal case fails to perfect his appeal within one year, he may avoid the dismissal thereof when the Attorney-General has moved to dismiss, by showing to the satisfaction of the Supreme Court "good cause" for not sooner perfecting his appeal, and that right he still has since the amendment of 1911 to section 2029, but the duty still rests on him to make a satisfactory showing that he has been unremitting in his diligence to perfect his appeal within twelve months after it was granted, and if he fails to make any showing his bill of exceptions cannot be considered. Said amendment applies to appeals in criminal cases, in so far as it permits the filing of bills of exceptions after the time granted by the trial court for filing has expired, provided such delay is not the result of appellant's own act of omission. *Ib.*
13. ———: ———: **Filing Transcript.** When a defendant in a criminal case has not obtained the permission of the Supreme Court to prosecute his appeal as a poor person until the time has expired for perfecting his appeal, he should immediately, upon obtaining such permission, tender to the clerk his transcript of the entire record, or make a satisfactory showing why he is unable to do so. *Ib.*
14. **Information: Felonious Intent.** An information which, after alleging the assault was feloniously made with a shotgun, and that the shooting and striking were done feloniously, states that the assault and shooting were done "with the intent then and there him the said Herod Williams on purpose and of his malice aforethought feloniously to kill and murder," sufficiently charges felonious intent to kill by means of a firearm. *State v. Mace*, 143.
15. ———: **Shotgun: Judicial Knowledge.** The courts judicially notice the dangerous and deadly nature of a shotgun and other like firearms. But that is not true of a rock, club and some other weapons. *Ib.*
16. **Juror: Challenge.** An attempted challenge of a venireman in his *voir dire* examination, in the words, "The defendant's counsel object to the juror; challenge him for cause," is the same as no challenge at all. A challenge for cause must be specific and point out the ground or reason for the challenge. *Ib.*
17. ———: ———: **Unnecessary Hazard.** But while such an attempted challenge cannot be considered on appeal, it is observed that courts and prosecuting attorneys, without reason,

CRIMINAL LAW—Continued.

often do the unwise and unnecessary thing of hazarding a prosecution upon the retention of a juror whose competency is uncertain, when it is always possible, usually from bystanders, to secure jurors about whose fairness and impartiality there can be no question. *Ib.*

18. ———: **Prior Opinion: Directed to Crime and Not to Defendant.** An expression by a trial juror indicating he entertained strong prejudice against the crime committed, by whomsoever committed, but not directed towards defendant, does not disqualify him, if upon his *voir dire* he testifies he has formed no opinion of defendant's guilt or innocence and will give him a fair trial. So that where a witness, by affidavit in support of a motion for a new trial, swore that she heard one of the trial jurors say "a fellow like that ought to be sent to the penitentiary," and the juror, in a counter affidavit swore that he was at the store at the time named, that a message came over the telephone that the prosecuting witness was fatally wounded and his wife was dying, that it was reported that the shooting had been done by defendant's father, that other persons present expressed the opinion that a person who would commit an act such as was detailed over the telephone should be in the penitentiary, but that he had no recollection of having made any such remark himself and if he did it was based on the telephone report, and that at no time or place prior to the trial had he said defendant was guilty, but that whatever he may have said was to the effect that if a person was guilty of such an act he should be in the penitentiary, and said juror on his *voir dire* had sworn he had formed no opinion, and the trial court, after hearing the affidavits, overruled the motion for a new trial it will not be held that the juror possessed such bias or prejudice as precluded him from giving defendant a fair trial, there being doubt as to whether the remark was made at all, and doubt if made whether it referred to the defendant or pertained to a general but commendable detestation of crime, and in such case the rule is that the doubt should be resolved in favor of the ruling of the trial court. *Ib.*
19. **Appeal: Criminal Case: No Brief.** Although appellant in a criminal case has filed no brief, still the Supreme Court under the statute must review the complete record. *State v. Fields*, 158.
20. **Indictment: Venue: Stated in Margin.** It is sufficient that the venue be named in the margin or caption of an indictment. *Ib.*
21. ———: **Time: Not of Essence of Offense: Killing Animal with Intent to Steal it.** Time is not of the essence of the offense of wilfully killing an animal with intent to steal it, and therefore an indictment is not invalid that fails to state the time when an alleged offense of that kind was committed. *Ib.*
22. **Objections to Evidence: Exceptions: Appeal.** To avail upon appeal an objection to the admission of evidence must assign a reason or ground why the evidence is objected to, and an exception must be saved to the court's action in overruling the objection. *Ib.*

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23. **Verdict: Supported by Evidence: Appeal.** Before the Supreme Court will relieve on the ground that the verdict is not supported by the evidence, there must be either a total failure of the evidence, or it must be so weak that the necessary inference is that the verdict is the result of passion, prejudice, or partiality. *State v. Fields*, 158.
24. ———: ———: ———: **Willfully Killing Hog with Intent to Steal It.** Although in a trial for willfully killing a hog with intent to steal it, there is no direct evidence that defendant shot the hog with such intent, yet, in view of the fact that the wound in the head of the animal was about the size of a silver dollar and contained portions of paper wadding, almost entirely discrediting plaintiff's statement that, thinking the hog a squirrel, he fired a shotgun at it while he was thirty or forty feet from it, and of the further facts that soon after the shooting he answered, "Nothing, nothing," to a question from a person on the place as to what he was doing, and told the constable on the night of his arrest that "he had killed the hog, he did not aim to let his family starve," it is held that the evidence is sufficient to support a verdict of guilt. *Ib.*
25. **Stealing from Person of Another: Sufficient Evidence.** The evidence in this case, though the account of the theft by the prosecuting witness is rambling, probably due to his natural stupidity, was sufficient to take the case to the jury, under an indictment charging defendant with having taken \$125 from the person of said witness, as they walked along a public street. *State v. Barrett*, 165.
26. **Robbery: At Common Law.** At common law the elements of robbery were practically the same as under the statute, Sec. 4530, R. S. 1909; and therefore common-law adjudications on the subject aid in understanding the statute. *State v. Parker*, 169.
27. ———: **One Offense: Two Methods.** The statute (Sec. 4530, R. S. 1909) denounces but one offense of robbery from the person, which, however, may be committed in two ways, namely: By the felonious taking of the property of another from his person (a) by violence or (b) by putting him in fear of some immediate injury to his person. And if there is neither violence nor putting in fear, the taking of \$2.25 from another's pocket is not robbery in the first degree, but larceny. *Ib.*
28. ———: **Fear: After Crime Has Been Committed.** Where the theft of \$2.25 from another's pocket, accomplished by the accused placing his hand in his pocket and extracting the money therefrom while an accomplice engaged him in conversation, no blow being struck or threatened, no weapon being used or shown, no threat of injury, either immediate or remote, being uttered, and the only fear being that after the money was taken he became frightened, there is no "putting in fear" in the sense in which those words are used in the statute. *Ib.*
29. ———: **Violence: Extracting Loose Coins.** Where the coins stolen were lying loose in another's pocket, and the thief, while an accomplice engaged him in conversation, inserted his hand in his pocket and extracted them, no force or violence being necessary to extract them and there being no knowledge

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that they were being extracted until the hand was felt in the pocket, there was no such violence as to constitute robbery in the first degree. The violence used in the robbery must precede or be contemporaneous with the taking of the property. [Distinguishing *State v. Broderick*, 59 Mo. 318.] *Ib.*

30. ———: **Convicted of Larceny.** Under an indictment for robbery the accused may, in a proper case, be convicted of larceny. And where the trial court should have sustained defendant's instruction in the nature of a demurrer to the evidence, since it fails to show he was guilty of robbery, yet as it does show that he was guilty of larceny, he will not, on his appeal, be discharged, but the judgment will be reversed, and the cause remanded for further procedure according to the law and the facts. *Ib.*
31. **Former Conviction: Under Eighteen Years of Age: Evidence.** The transcript of the indictment and the judgment showing defendant has been convicted of burglary in another State, is not incompetent on the sole ground that defendant has testified that at the time of his conviction he was under eighteen years of age, and therefore under the laws of this State he could not have been sentenced to the penitentiary. The jury is never precluded by the oral testimony for either the State or defendant, and was not compelled to believe defendant's testimony, though uncontradicted, that at the time of his conviction in that State he was under eighteen years of age. The transcript was competent evidence, and if it be a fact that his serving of a sentence in the penitentiary of another State cannot be considered by the jury under the laws of this State, because at the time of his conviction he was under eighteen years of age, then his testimony raised an issue which could have been dealt with only by instructions. *State v. Levy*, 181.
32. ———: ———: **No Instruction: Not Raised By Motion for New Trial.** If it be an error of the trial court to fail to instruct the jury that the fact, if it were a fact, that defendant was under eighteen years of age when convicted precludes the jury from considering his said former conviction in another State in assessing his punishment, it was an error of omission to instruct, and in order to be available to defendant on appeal his motion for a new trial should contain a specific assignment that the trial court failed to instruct on the point. *Ib.*
33. ———: ———: **Transcript: Not Properly Certified: Untimely Objection.** An objection that the transcript of a defendant's conviction in another State is not properly certified and authenticated under the laws of Congress, comes too late, if made for the first time after the transcript was admitted and read into the record. When improper evidence is offered it is the duty of the party who might be injured by its admission to object specifically then and there by informing the court why it should not be admitted. *Ib.*
34. ———: ———: ———: ———: **Admission of Attorney That Transcript is in Proper Form.** Besides, if when the transcript of defendant's conviction in another State was offered in evidence his attorney informed the court that it was "in proper form," an objection that it was not properly certified

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and authenticated under the laws of Congress, made after it was admitted and read into the record, should be disregarded, since an admission made by an attorney in open court during the trial of a cause against the interests of his client is presumed to be true. *State v. Levy*, 181.

35. **Robbery: Instruction: Recent Possession.** An instruction set out in paragraph three of the opinion, on the subject of recent possession of stolen money and the duty of defendant to explain his possession of it, does not assume that the money found in possession of defendant was the identical money stolen from the prosecuting witness, but requires the jury to find that the money found in defendant's possession was recently stolen from such witness before they are permitted to presume that defendant was the party who stole it. *Ib.*
36. **Misconduct of Prosecuting Attorney: Statement of Facts Unable to Prove: Cured by Instruction.** The misconduct of a prosecuting attorney will be weighed in connection with the facts of each case, and when the State's case is weak it will require less misconduct on the part of the prosecutor to work a reversal than where the evidence of defendant's guilt is strong. Where the assistant circuit attorney in his opening statement of the case against defendant charged with robbery, detailed to the jury certain alleged evidence of attempted bribery of the prosecuting witness, and after his failure to introduce such promised evidence, the court properly instructed the jury to disregard the statements pertaining to such attempted bribery, the evil effect of such unwarranted statement was thereby cured, the evidence of defendant's guilt being satisfactory. *Ib.*
37. **Robbery: Money: Coins and Bills: Identification: Presumption Arising From Possession.** The prosecuting witness, as he boarded a street car, felt "an unusual disturbance" in his trouser's pocket. Before the car started he discovered his pocketbook was gone, and he immediately got off the car. A police officer, on the car, saw defendant hurry through the car and get off at the front end, and his suspicions were aroused, and he also got off in time to see defendant board another car going in the opposite direction. Upon being informed by the prosecuting witness that his pocketbook had been stolen, the officer followed defendant on the next car and overtook him at a cross street as he was coming towards the car track, and when asked what he was doing there he replied that he had gone to that cross street to see a lumberman, but had failed to find him. There was no lumber yard or office in that part of the city. The prosecuting witness testified that he had in his pocketbook when it was stolen, two twenty-dollar bills, one five-dollar bill and a ten-dollar gold piece dated 1902; also five pennies which he had carried for some time as keepsakes, and that they were dirty and one of them of a dark color. When defendant was searched, in one pocket was found a roll of one-dollar bills "nicely folded," and in another two twenty-dollar bills and one five-dollar bill, not folded, but "all crumpled up," and five pennies of the same color and description as those the prosecuting witness had in his pocketbook. No ten-dollar gold piece was found in his pocket, but when his underclothes were removed a ten-dollar gold piece dated 1902 fell out of them. The police office then went to the cross street where defendant was arrested, and about three hundred

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feet from where the arrest was made found the empty pocket-book. *Held*, that both coins and bills frequently become so discolored or worn as to give them a peculiar appearance by which they can be identified with reasonable certainty, and the stolen money was sufficiently identified to warrant an instruction on the presumption of guilt arising from possession of recently stolen property. *Ib*.

38. **Instruction: Failure to Give Defendant's: Covered by State's: Enticing Female to Prostitution.** In a prosecution for taking away from her father a certain female under the age of eighteen years for the purpose of prostitution, it was not error to refuse to instruct the jury that if said girl went to the house of defendant with Lillian Cameron under the circumstances and conditions testified to by said Lillian the verdict must be for defendant, where the court instructed the jury that unless they found that the defendant took said girl from her father "for the purpose of prostitution as mentioned in this instruction, you will find her not guilty," there being no proof of a conspiracy or any connection between defendant and Lillian Cameron until prosecutrix was in defendant's house; for, although it be conceded that said instruction, though a vicious comment on the evidence and therefore not in proper form, pertained to a proper matter of defense which was complete if Lillian Cameron's testimony was true and therefore it was the duty of the court to give a proper instruction on the subject, yet the very substance of the instruction requested was embodied in the one given. *State v. Corrigan*, 195.
39. ———: **Taking Away Girl for Prostitution: No Definition of Taking Away, Etc.** An instruction telling the jury that if defendant did unlawfully and intentionally take away the fifteen-year old girl from her father, "for the purpose of prostitution, by having illicit intercourse with divers men," etc., thereby fully incorporating the language of the statute, is not erroneous because it does not go further and define the words "taking away for the purpose of prostitution" by stating that such taking away might have been accomplished by persuasion, enticement or inducement of money offered or means furnished by defendant; for, though said additional explanation might have been proper in view of the evidence, if its omission was an error, it was one in defendant's favor. *Ib*.
40. **Cross-Examination of Defendant: Houses of Prostitution in Other Cities: Denied.** Where, in a prosecution of an accused for taking away from her father a girl under eighteen years of age for the purpose of prostitution, the girl has testified that defendant stated to her at the time she entered her house in St. Charles that she had a house of prostitution in Jefferson City, it was not harmful error for the State to ask her on cross-examination if she had such a house in Jefferson City, a matter not mentioned in her examination in chief, where defendant answered that she had not. However, if defendant had admitted that she had or had run such a house in Jefferson City a different case would be up for a ruling. And since no objection was made or exception saved to the State's inquiry of her on cross-examination if she had run such a house in Columbia, the propriety of that inquiry cannot be considered on appeal. *Ib*.
41. **Evidence: Testimony of Event Subsequent to Offense: Harmless Error: Presumption That Officer Performs Legal**

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- Duty.** Where defendant was being prosecuted for taking a fifteen-year old girl away from her father for the purpose of prostitution, and a deputy sheriff was offered by the State for the purpose of showing that defendant's house was being operated by her as a house of prostitution some two or three weeks subsequent to the time the prosecutrix was taken therefrom, and the only testimony of said witness was that as such deputy sheriff he went to said house at the time indicated "with the intention of closing it," leaving as an inference that he did not close it, the error in admitting the testimony was harmless; for, it being presumed that an officer performs his legal duty, the inference is that had the house been operated as one for prostitution he would have closed it, and that he did not close it because upon examination he found it was not being so operated, and therefore the error, in so far as it was not innocuous, was in defendant's favor. *State v. Corrigan*, 195.
42. ———: **Prior Good Reputation of Prosecutrix.** It would be error to admit evidence on the part of the State of the prior good reputation of prosecutrix before the defendant had attacked her reputation. But testimony brought out by a cross-examination of the State's witness to the effect that the loathsome disease which prosecutrix had when she was taken from defendant's house of prostitution, was contracted before she went to said house, and testimony of defendant's witness that prosecutrix was on her way to another house of prostitution when said witness persuaded her to go with her to defendant's house, was as serious an attack upon prosecutrix's reputation for chastity as would have been the offering of character witnesses to show her bad reputation for chastity, and authorized the State in rebuttal to show her reputation was good. *Ib.*
43. ———: **Taking Away Girl For Prostitution: Intent.** The gravamen of the offense of taking away from her father a girl under eighteen years of age for the purpose of prostitution, is the purpose or intent with which the taking away is accomplished; and intent is a hidden mental process, deducible in a criminal case especially, since the State may not use the defendant to prove it, from words or overt acts alone. *Ib.*
44. ———: ———: ———: **Shown by Sexual Acts.** That the prosecutrix was taken away for the purpose of prostitution can in no way be more clearly shown than by the fact that she was received into defendant's house of prostitution, kept there by defendant, and when occasion offered sent by defendant to a room with a man who gave her money and had sexual intercourse with her. *Ib.*
45. ———: ———: ———: ———: **Act of Rape.** Nor need the act of sexual intercourse be shown to have been voluntary. The fact that it was accomplished by the forceful ravishment of the girl by a drunken man sent to her room by defendant, with all its ugly details, may be shown in evidence, as a part of the *res gestae*. Nor does the fact that the evidence of the rape and a recital of its details may add to the punishment imposed by the jury, render the evidence incompetent. *Ib.*
46. ———: ———: ———: ———: ———: **Res Gestae: Accessory.** The details of the force used by the drunken man, sent to prosecutrix's room by defendant, are parts of the *res gestae* and are admissible against defendant, though the

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rape was done out of her immediate presence and not specifically commanded by her to be done. An accessory before the fact, who instigates the unlawful act, is liable; and if the acts are *res gestae* they are always admissible even though they show the commission of another crime committed in the accomplishment of the crime undertaken. *Ib.*

47. **Assault: Decree: Instruction.** Section 4482, Revised Statutes 1909, does not purport to include any class of assaults except those for which no punishment has been prescribed by preceding sections, and as the crime of assault with intent to kill by shooting at a human being is specifically prohibited and the punishment therefor prescribed by section 4481, it is not error to decline to instruct upon the crime of assault denounced by section 4482 where defendant is charged with the offense denounced by section 4481. *State v. Curtner*, 214.
48. **Impeachment of Witness: Statement out of Court.** Statements made by a witness out of court in conflict with his testimony for the State cannot be used to contradict or impeach the witness unless he is asked while giving his testimony if he made the alleged contradictory statements. *Ib.*
49. **Exclusion of Evidence: Cured by Subsequent Examination.** Error in excluding evidence of the details of a difficulty between defendant and the prosecuting witness prior to the shooting, is cured by the adroitness of defendant's counsel in eliciting from the witnesses offered the full details of the prior difficulty. *Ib.*
50. **Exhibiting Wounds to Jury.** It is not error to permit the prosecuting witness to exhibit his wounds to the jury, in a prosecution for assault with intent to kill by shooting with a shotgun, whereby said witness lost his eyesight. Such evidence may tend to create prejudice in the minds of the jury, but they have a right to know the result of the assault as an aid in arriving at the proper punishment to be fixed. *Ib.*
51. **Excessive Punishment.** A verdict assessing defendant's punishment at seven years' imprisonment in the penitentiary for an unprovoked assault with intent to kill, where after a quarrel in the public road with the drunken prosecuting witness he bought shells, borrowed a shotgun, and shot him in the face, as a result of which he lost his eyesight, does not indicate such malice or prejudice on the part of the jury as authorizes a new trial. *Ib.*
52. **Evidence: Error in Exclusion: Cured by Cross-Examination.** On a trial for embezzlement, error in sustaining an objection to a question whether the prosecuting witness had expected to marry the defendant was cured by the fact that after such ruling the witness was fully cross-examined on that point and stated that there was a prospect that they might marry in the future. *State v. Baker*, 689.
53. **——: Theory of Defense: Embezzlement.** While it is true that when the evidence in a criminal case tends to establish a defense inconsistent with the testimony of the defendant, he is not bound by his testimony, but is entitled to instructions on the theory shown by the other evidence, yet he may not cause the court and adversary counsel to pursue a certain

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course and then at the outcome repudiate its legal validity; and accordingly, where a defendant on trial for embezzling \$2000 testified that he never received the sum in question, and his attorneys at the trial said they did not claim it was borrowed money, the testimony of the prosecuting witness at the preliminary examination was properly admitted at the trial, although the examining court had refused to permit her to say whether she had received \$50 for the use of \$200 lent the defendant at another time, thus, the defendant asserts, denying him the right to a full cross-examination, and of the value of a fact, if the question had been affirmatively answered, from which the jury might have inferred that the \$2000 was a loan also. *State v. Baker*, 689.

54. ———: **Judge's Comment at Preliminary Hearing: Incompetent at Trial: Harmless Error.** Although comment on the evidence by a judge at a preliminary examination is not competent evidence on the trial, yet where the evidence itself was before the jury and clearly bore out the judge's comment, the admission of the judge's expression was harmless error. *Ib.*
55. ———: **Impeaching Witness: Particular Instances of Misconduct.** The character of a witness cannot be impeached by showing through other witnesses special instances of misconduct. *Ib.*
56. ———: **Admissibility: Embezzlement: Defendant Showing Possible Use of Money by Prosecutrix.** Proof that the prosecuting witness, since deceased, whose testimony at the preliminary hearing was read in evidence at the trial of the defendant for embezzlement, had been in trouble with the Federal officers and had hired lawyers to represent her, was not competent without a showing that the lawyers were paid the money the defendant was charged with embezzling. *Ib.*
57. **Order of Proof: Discretion of Court: Embezzlement.** The order of testimony rests largely in the discretion of the trial court, and it is not error to admit in rebuttal testimony which might have been given in chief. *Ib.*
58. **Argument of Counsel: Epithets not Approved: Non-prejudicial Error.** Epithets applied to a defendant by the State's attorney in his argument to the jury are not approved, but where the court is satisfied that calling the defendant a "crook" did not influence the verdict there is no ground for reversal. *Ib.*
59. ———: **Expressing Belief in Defendant's Guilt: Non-prejudicial Error.** An expression by the State's attorney in his argument to the jury of his belief in the defendant's guilt is not approved; but such misconduct of counsel is not reversible error when the evidence clearly justified a conviction. *Ib.*

DAMAGES.

1. **Punitive: No Actual Damages.** Punitive damages may be recovered where a proper basis therefor is laid in the petition and proved, although the plaintiff recover only nominal actual damages. *Keller v. Summers*, 324.
2. ———: **Recovery on Grounds Not Pleaded: Fraud: Larceny.** Where the petition charged that defendants obtained plaintiff's certificate of deposit for \$300 by fraud, conspiracy and procuring

DAMAGES—Continued.

him to become drunk and a party to a gambling game, but did not impute to them the technical crime of larceny, an instruction, properly hypothesizing the conditions upon which he can recover actual damages, is error if it authorizes the jury to return a verdict for punitive damages if they believe the defendants had stolen the certificate. *Ib.*

3. ———: ———: **Segregated Error.** But the error of a verdict for punitive damages authorized by an instruction on a ground not pleaded, does not affect that part of it for actual damages, and the finding for punitive damages being capable of segregation from the rest of the verdict, the judgment will be affirmed, notwithstanding said erroneous instruction, if plaintiff will file a *remittitur* of the punitive damages. *Ib.*
4. **Public Road: Appeal to Circuit Court: Matters for Consideration: Judgment.** Where the county court found the road to be necessary and entered judgment establishing it, and a landowner appeals to the circuit court solely from the award of damages to him, the judgment of the county court establishing the road is not drawn in question or put in jeopardy by the appeal, and to that extent the judgment remains final, operative and self-enforcing, and it is not necessary for the judgment of the circuit court to find the jurisdictional facts upon which the location and establishment of the public road depends. *Howell v. Jackson County*, 403.
5. ———: ———: ———: **Affidavit for Appeal: Merits.** An affidavit for appeal by a landowner from the award of damages by the jury in the county court to him for land taken in which it is stated that he "is injured by the verdict of the jury and the judgment of the court, and this appeal is from the merits and an order and judgment taxing costs," when fairly read, means that the appeal was taken only from the verdict and judgment for damages and costs, the word "merits" being due to the statutory relation between appeals from justices' courts and from county courts. *Ib.*
6. ———: ———: **Liability of County for Damages.** When the county court has found the proposed road to be of sufficient public utility to warrant its establishment at the expense of the county, has caused it to be opened and has taken possession, the county thereby becomes irrevocably bound, by its own election, to pay the damages assessed in the circuit court in favor of a landowner whose property was taken for the road and who excepted to the commissioners' award and to the verdict of the jury in the county court, and appealed to the circuit court on the issue of the amount of damages alone. *Ib.*
7. ———: **Measure of Damages: Fences: Twice Added.** In estimating the damages to a landowner caused by constructing a public road through his land, the jury may be instructed that, in estimating his damages, they may take into consideration the cost of building a new fence, when such fence is necessary; but they should not be told to "consider the quantity and value of the land taken for the road, and also the cost of building the necessary fences along said road, and damage to the whole tract of land of which that taken forms a part, and from the sum of these deduct the benefits peculiar to such tract;" for that is, in effect, by loose language, to tell them

DAMAGES—Continued.

to add the cost of the fence to the sum of the value of the land taken and damage to that not taken, when, in fact, the cost of fencing is but one of the elements that go to swell the owner's damage. *Howell v. Jackson County*, 403.

8. ———: ———: ———: ———: **Error Corrected on Appeal.** Where the verdict is swollen by a definitely ascertained and segregated erroneous amount, the false item may be eliminated by excision, by requiring a *remittitur*. Where the instruction authorized the jury to return a verdict for the value of constructing a fence made necessary by the establishment of a public road, in addition to the value of the land taken and damage to that not taken, and all the witnesses agree on the cost of such a fence, that cost will be deducted from the gross amount of the verdict for damages, as a condition of affirmance. *Ib.*
9. **Pleading: Proof: Surplusage.** Proof is required of those allegations only that are necessary to a recovery, and those unnecessary to that end may be eliminated as surplusage. *Wessel v. Lavender*, 421.
10. ———: ———: ———: **Action for Ravishing Unconscious Female: Cause of Unconscious State: Not an Issue: Instructions.** Where the petition in an action for damages for ravishment alleged that the defendant, a physician, administered medicine to the plaintiff while she was sick in bed, and she having become unconscious under the influence of the medicine, the defendant had sexual intercourse with her, the cause of the plaintiff's unconsciousness was not an issue, and the giving of an instruction requiring a finding that it resulted from the medicine was reversible error. *Ib.*
11. **Action for Ravishment: Female's After-agreement to Keep Silent: Her Testimony.** Where there is reversible error in an instruction, a verdict for the defendant in an action for damages for ravishment will not be affirmed on the ground that the testimony of the plaintiff, who had agreed to keep silent in consideration of a payment to be made to her by the defendant, was unworthy of belief. *Ib.*
12. **Nominal: Request for Limit to Must Be Made by Defendant.** If there is some substantial evidence that future medical services will be necessary, and defendant is of the opinion that it is not sufficient to support a finding of actual damages, it is its duty, if it wishes to limit plaintiff's recovery to nominal damages on that score, to ask an instruction to that effect. *Sang v. St. Louis*, 454.
13. **Negligence: Modest Sum: Instruction: Elements Unsupported by Evidence.** Where the evidence establish serious and permanent injuries, and the verdict is for a modest sum and is absorbed by referring it to damages plainly suffered and about which there can be no speculation, it would be trifling with justice to suppose the jury allowed anything of substance on the issue of future medical services; and though the instruction permits a finding for future medical services, the verdict will not be reversed on the ground that the evidence fixes no definite amount or character of services to be rendered. *Ib.*

DAMAGES—Continued.

14. **Proper Plaintiff: Widow of Killed Fireman: Under U. S. Employers' Liability Act.** The right of a widow of a fireman for a train of empty cars being hauled by an interstate railroad from a point in one State to a point in another State, to recover for his negligent death, caused by a collision of his train with another, is dependent on the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act. Where said act is invoked and the shipment and road are interstate, the plaintiff's right to recover is regulated thereby, and not by the State Damage Act (Sec. 5425, R. S. 1909). *Thompson v. Railroad*, 468.
15. **Public Wharf: Forcible Entry: Selling Complainant's Personal Property Thereon.** The action of forcible entry and detainer is not to be affected in any wise by the fact that the city, in the exercise of its municipal right to remove obstructions from a public wharf, in entering upon the land to remove the obstructions seized certain lumber belonging to complainant and sold it at public auction. Damages on that score cannot be awarded in such a suit. *Hafner Mfg. Co. v. St. Louis*, 621.
16. **Rights Acquired By Violation of Ordinance.** If the city ordinance is valid and binding, the railroad company cannot gain any advantage by violating it. Where it appears that, if the railroad company had obeyed the ordinance requiring it to build a viaduct in a street crossed by its tracks, the viaduct would have been almost completed before the suit was brought to compel it to obey it, the courts will not listen with patience to its prayer that, as no actual work has been done on the viaduct and the later enacted statute permits the Public Service Commission to apportion the costs between the city and the company, said apportionment should be made by the courts. *State ex rel. v. Railroad*, 720.

DEDICATION OF STREETS AND ALLEYS. See *Conveyances*, 2 to 4.

DEEDS. See *Conveyances*.

DEPOSITION.

1. **Absent from Record.** The court will not hold that it was error to refuse the offer of a deposition in evidence if it has not been copied into the record. *Heinbach v. Heinbach*, 69.
2. **Copy.** It is not error to refuse to permit a carbon copy of a deposition to be offered in evidence, if it shows unexplained interlineations, and there is no showing that the original has been lost and no inquiry has been made of the proper custodian, and no effort made to supply it in the way provided by statute. *Ib.*
3. **Identity of Deponent.** If counsel on both sides and the court knew that deponent was too ill to appear at the trial and was the same person whom the carbon copy of the deposition indicates to be the deponent, and there was no objection to offering it in evidence on the ground of failure to identify, the refusal of the trial court to permit the carbon copy to be read in evidence on the sole ground of failure to identify could not be excused on appeal. *Ib.*

DEPOSITION—Continued.

4. **Whereabouts of Deponent.** Where the deposition shows that deponent resides in the county and within ten miles of the place of trial, it is necessary, as a condition precedent to the admission of the deposition in evidence, that the party offering it show some one of the conditions prescribed by Sec. 6411, R. S. 1909. *Heinbach v. Heinbach*, 69.
5. ———: **How Shown: By Subpoena.** A subpoena properly issued by the clerk and a *non est* return thereon, are not alone a sufficient showing that a resident deponent who resides within the county is without the State or gone to a greater distance within the State than forty miles from the place of trial, and therefore to authorize the reading of her deposition in evidence. *Ib.*

DISCRIMINATION IN FAVOR OF MILITIA. See *Railroads*.

DOWER.

Limitations: Thirty-Year Statute. A widow who claims dower in land which belonged to her husband during his life-time cannot recover in an action for the admeasurement of dower, if the land has been in the lawful possession of those who bought at a foreclosure sale under a deed of trust signed by her and her husband and of those who claim under them, for thirty-one consecutive years before her suit was instituted, and during all that time neither she nor any one for her has paid any taxes, and if the title emanated from the government more than ten years before the entry by lawful possession of any person holding the premises. *Jodd v. Mehrtens*, 391.

DRAINAGE DISTRICT.

1. **Fraud: Injunction: Misrepresentation as to Costs and Location.** The work of constructing and maintaining a drainage district cannot be halted for that some of the men who afterwards became supervisors, in circulating the petition for the incorporation of the district for signatures among the landowners, represented to them that the cost of excavation would not exceed seven cents per cubic yard and that the main drainage ditch would be located on low ground or along a certain line. At that time the men were not members of the board of supervisors, and any misrepresentations they made are not binding on the district subsequently organized. *Carder v. Drainage District*, 542.
2. ———: **Cost of Construction.** The circuit court, in which the proceeding for the incorporation of a drainage district is begun and finally consummated, judicially determines, upon the presentation of a petition by landowners for articles of incorporation, whether the costs of the proposed improvement will be out of proportion to the benefits that will accrue both to the district as a whole and the several parcels of land therein; if the court finds the estimated costs will exceed the benefits it disapproves the report of the commissioners appointed to determine the question of damages and benefits, and thereupon the incorporation is dissolved; and these things the petitioners are presumed to know and have in mind when they attach their names to the petition. Therefore, the estimated cost of the landowners who circulated the petition, that the total cost will be so much per cubic yard or so much per acre, whether their

DRAINAGE DISTRICT—Continued.

estimate was too large or too small, cannot be used to imperil the corporation or to destroy it, or to stop the work of construction. *Ib.*

3. **Conspiracy to Locate Ditch.** A conspiracy between the members of the board of supervisors to locate the drainage canal in such a way as to favor the interests of themselves and of other landowners, which the evidence shows failed of its purpose, the result being that the ditch was not located where they desired it located, will not authorize a decree enjoining the construction and maintenance of the ditch. *Ib.*
4. ———: **Barren of Results.** A barren and abandoned conspiracy, sounding in words but void of substance in either acts or results, is not actionable, unless there is a statute making it actionable. *Ib.*
5. ———: **Power to Restrain by Injunction.** Whether or not an alleged conspiracy formed between the supervisors after the district has been organized, to locate the drainage canal in a way to benefit most largely their own lands to the injury of others, will authorize a decree enjoining the construction and maintenance of the ditch, will not be decided where the evidence affirmatively shows that such conspiracy, if it ever existed, was barren of results. But it would seem that Secs. 5514, 5515, 5518a, R. S. 1909, make it unnecessary to resort to the extraordinary remedy by injunction, though that is not decided. *Ib.*

EASEMENT.

Implied: Obstruction: Injunction. For the reason stated in *Bussmeyer v. Jablonsky*, 241 Mo. 681, the judgment in this case in which plaintiff wishes to enforce an implied easement conferred upon one piece of property by the owner of the adjoining piece, and to enjoin the defendants from obstructing the entrance to a three-foot passageway upon a lot owned by defendants, is reversed, the facts and issues being the same. *Jablonsky v. Wussler*, 320.

EJECTMENT.

1. **Amending Petition: Changing Cause of Action: Mistake in Description of Land.** Where the original petition in ejectment described the northeast fractional quarter of a section 27, it is not error to permit the plaintiff to file an amended petition describing the land sued for as the northeast fractional quarter of section 28, and after a motion to strike out the amended petition, on the ground that it is the substitution of a new cause of action and not an amendment of the cause of action stated in the original petition, is overruled and defendant stands mute, to render judgment *nil dicit* for plaintiff on said amended petition for the land described therein. *Broyles v. Eversmeyer*, 384.
2. ———: **Statute Authorizing Correction of Mistake.** Sec. 1848, R. S. 1909, declaring that the court, at any time before final judgment, in furtherance of justice, and on such terms as may be proper, may amend any pleading by correcting "a mistake in any other respect," authorizes the court to permit plaintiff in ejectment to file an amended petition changing the

EJECTMENT—Continued.

description of the land sued for; and a record entry showing that "leave is granted plaintiff to file an amended petition correcting error in description" is a finding by the court that a mistake was made in the description of the land in the original petition, and those things appearing it will not be held that the amended petition was the substitution of a new and different cause of action. *Broyles v. Eversmeyer*, 384.

ELECTIONS.

1. **Coalition of Parties: Printing Names on Different Tickets.** The Act of 1913, prohibiting party fusion and denying to a candidate of one political party the right to have his name also printed on the party ticket of another political party as its candidate for the same office, having been *held* unconstitutional (261 Mo. 515), the county clerk has no power to refuse to print the name of a candidate for Representative upon the tickets of two political parties, where he has been nominated at a primary election by one of such parties, and substituted by the county committee of the other in the stead of its own candidate for the same office who has resigned. The statutes as they now stand do not prohibit a man from being the candidate of two political parties.
Held, by GRAVES, J., dissenting, with whom WOODSON, J., concurs, that the Act of 1913 prohibiting fusion of political parties is not unconstitutional, as *held* in *State ex rel. Schmoll v. Drabelle*, and whether it received the number of votes required by the Constitution was a question for the legislative body to determine, and that act being valid the peremptory writ of mandamus should be denied. *State ex rel. v. Seibel*, 220.
2. ———: ———: **Sec. 5848, R. S. 1909: Not Question for County Clerk.** It is not for the county clerk to determine that the attempted substitution upon its party ticket of a candidate of another party for the same office, by the county committee, in the stead of its own nominee who has resigned, is in violation of Sec. 5848, R. S. 1909, providing that "no committee shall have the power to substitute, to fill any vacancy, the name of any person who is not known to be of the same political belief and party as the person for whom he is substituted." That section lays a duty upon the party committee, but it lays none on the county clerk, and it does not authorize him to exercise the judicial function of saying that the person substituted is known not to be of the same political belief and party as the person for whom he is substituted. *Ib.*
3. **Candidates: Payment of Filing Fee.** *Held*, by BROWN, J., that a county clerk cannot refuse to print the name of a candidate for office on the party ticket on the sole ground that he had not paid the filing fee to the committee treasurer required by Sec. 5879, R. S. 1909. Said requirement is violative of the constitutional provision (Art. 2, sec. 9) ordaining that "all elections shall be free and open." That provision applies to both candidates and voters. Such a statute is against sound public policy. *Ib.*

EMBEZZLEMENT.

1. **Theory of Defense.** While it is true that when the evidence in a criminal case tends to establish a defense inconsistent

EMBEZZLEMENT—Continued.

with the testimony of the defendant, he is not bound by his testimony, but is entitled to instructions on the theory shown by the other evidence, yet he may not cause the court and adversary counsel to pursue a certain course and then at the outcome repudiate its legal validity; and accordingly, where a defendant on trial for embezzling \$2000 testified that he never received the sum in question, and his attorneys at the trial said they did not claim it was borrowed money, the testimony of the prosecuting witness at the preliminary examination was properly admitted at the trial, although the examining court had refused to permit her to say whether she had received \$50 for the use of \$200 lent the defendant at another time, thus, the defendant asserts, denying him the right to a full cross-examination, and of the value of a fact, if the question had been affirmatively answered, from which the jury might have inferred that the \$2000 was a loan also. *State v. Baker*, 689.

2. **Admissibility: Defendant Showing Possible Use of Money by Prosecutrix.** Proof that the prosecuting witness, since deceased, whose testimony at the preliminary hearing was read in evidence at the trial of the defendant for embezzlement, had been in trouble with the Federal officers and had hired lawyers to represent her, was not competent without a showing that the lawyers were paid the money the defendant was charged with embezzling. *Ib.*

EMINENT DOMAIN. See **Condemnation.**

EMPLOYERS' LIABILITY ACT. See **Parties to Action.**

ENTICING GIRL TO HOUSE OF PROSTITUTION. See **Prostitution.**

ESTOPPEL

Former Adjudication: Matters Concluded. Where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit between the same parties upon a different claim or demand, the inquiry must always be as to the point or question actually litigated and determined in the original action, not as to what might have been thus litigated and determined. Only upon such matters is the judgment in the first action conclusive in the second. *State ex rel. v. Mining Co.*, 490.

EVIDENCE.

1. **Negligence: Question for Jury: Reports to Defendant Introduced by Plaintiff.** Evidence in an action by a widow for damages for the death of her husband through the negligent managing of hand cars by defendant's employees held to justify a submission of the case to the jury despite the fact that, to show notice, plaintiff introduced reports of employees, made to the company in compliance with its rules, which tended to show due care on defendant's part and contributory negligence on that of deceased. *Diariotti v. Railroad*, 1.
2. **Will Contest: Substantial Testimony: Drunkenness.** Where there is testimony that testator was an old man and for many years had been an extreme drunkard; two physicians say he

EVIDENCE—Continued.

died of alcoholic dementia, one of them that his condition of dementia must have extended back to a period of time before the will was made; certain statements made by testator indicate that they were either the idle vaporings of intoxication or the result of mental hallucinations, and one son is wholly unaccounted for; and, on the other hand, another physician, with opportunity to know, testifies that he was not afflicted with senile or alcoholic dementia, and nine lay witnesses positively testify that he was of sound mind, the question of his mental capacity to make a will is one for the jury; for the evidence being substantial, its very inconclusiveness requires the submission of that issue of fact to the triers of the fact, and their finding, if the instructions were proper and there was no error in the admission or rejection of evidence, is conclusive on the appellate court. *Heinbach v. Heinbach*, 69.

3. ———: **Interest of Witness: Attorney: Contract of Employment.** The interest of any witness in the outcome of a suit may always be shown for the purpose of affecting the credibility of his testimony; but where the witness has admitted that he is an attorney in the case, and has been asked to assist in the trial by the attorney who has a contract of employment by some of contestants for a contingent interest in the property if the will is rejected, it is not prejudicial to the sole proponent to reject as evidence such contract, since it in nowise bears on the issue of testator's incapacity and the interest of the witness is sufficiently shown. *Ib.*
4. **Deposition: Absent from Record.** The court will not hold that it was error to refuse the offer of a deposition in evidence if it has not been copied into the record. *Ib.*
5. ———: **Copy.** It is not error to refuse to permit a carbon copy of a deposition to be offered in evidence, if it shows unexplained interlineations, and there is no showing that the original has been lost and no inquiry has been made of the proper custodian, and no effort made to supply it in the way provided by statute. *Ib.*
6. ———: **Identity of Deponent.** If counsel on both sides and the court knew that deponent was too ill to appear at the trial and was the same person whom the carbon copy of the deposition indicates to be the deponent, and there was no objection to offering it in evidence on the ground of failure to identify, the refusal of the trial court to permit the carbon copy to be read in evidence on the sole ground of failure to identify could not be excused on appeal. *Ib.*
7. ———: **Whereabouts of Deponent.** Where the deposition shows that deponent resides in the county and within ten miles of the place of trial, it is necessary, as a condition precedent to the admission of the deposition in evidence, that the party offering it show some one of the conditions prescribed by Sec. 6411, R. S. 1909. *Ib.*
8. ———: ———: **How Shown: By Subpoena.** A subpoena properly issued by the clerk and a *non est* return thereon, are not alone a sufficient showing that a resident deponent who resides within the county is without the State or gone to a greater distance within the State than forty miles from the place of trial, and therefore to authorize the reading of her deposition in evidence. *Ib.*

EVIDENCE—Continued.

9. **Objections: Must be Specific.** To avail upon appeal an objection to the introduction of evidence must be specific. The remark, "Question objected to," will not suffice. *Springfield v. Owen*, 92.
10. **Coindicttee: Testifying Without Objection.** An assignment that a co-indicttee was used as a witness against defendant before a *nolle prosequi* had been entered cannot be considered on appeal, if no objection was interposed to his competency when he was offered as a witness. No objection to the competency of a witness can be considered on appeal which was not raised at the proper time in the trial court. *State v. Walls*, 105.
11. **Conviction: On Evidence of Accomplice.** A defendant may be convicted of stealing chickens in the nighttime upon the testimony of an accomplice. *Ib.*
12. **Question for Jury.** Evidence in a trial for exhibiting a pistol in a rude, angry, and threatening manner in the presence of others *held* to justify a submission of the case to the jury. *State v. Nichols*, 113.
13. **Objections: Exceptions: Appeal.** To avail upon appeal an objection to the admission of evidence must assign a reason or ground why the evidence is objected to, and an exception must be saved to the court's action in overruling the objection. *State v. Fields*, 158.
14. **Verdict: Supported by Evidence: Appeal.** Before the Supreme Court will relieve on the ground that the verdict is not supported by the evidence, there must be either a total failure of the evidence, or it must be so weak that the necessary inference is that the verdict is the result of passion, prejudice, or partiality. *Ib.*
15. ———: ———: ———: **Wilfully Killing Hog with Intent to Steal It.** Although in a trial for wilfully killing a hog with intent to steal it, there is no direct evidence that defendant shot the hog with such intent, yet, in view of the fact that the wound in the head of the animal was about the size of a silver dollar and contained portions of paper wadding, almost entirely discrediting plaintiff's statement that, thinking the hog a squirrel, he fired a shotgun at it while he was thirty or forty feet from it, and of the further facts that soon after the shooting he answered, "Nothing, nothing," to a question from a person on the place as to what he was doing, and told the constable on the night of his arrest that "he had killed the hog, he did not aim to let his family starve," it is *held* that the evidence is sufficient to support a verdict of guilt. *Ib.*
16. **Stealing from Person of Another: Sufficient Evidence.** The evidence in this case, though the account of the theft by the prosecuting witness is rambling, probably due to his natural stupidity, was sufficient to take the case to the jury, under an indictment charging defendant with having taken \$125 from the person of said witness, as they walked along a public street. *State v. Barrett*, 165.
17. **Robbery: Violence: Extracting Loose Coins.** Where the coins stolen were lying loose in another's pocket, and the thief

EVIDENCE—Continued.

while an accomplice engaged him in conversation, inserted his hand in his pocket and extracted them, no force or violence being necessary to extract them and there being no knowledge that they were being extracted until the hand was felt in the pocket, there was no such violence as to constitute robbery in the first degree. The violence used in the robbery must precede or be contemporaneous with the taking of the property. [Distinguishing *State v. Broderick*, 59 Mo. 318.] *State v. Parker*, 169.

18. **Former Conviction: Under Eighteen Years of Age.** The transcript of the indictment and the judgment showing defendant has been convicted of burglary in another State, is not incompetent on the sole ground that defendant has testified that at the time of his conviction he was under eighteen years of age, and therefore under the laws of this State he could not have been sentenced to the penitentiary. The jury is never precluded by the oral testimony for either the State or defendant, and was not compelled to believe defendant's testimony, though uncontradicted, that at the time of his conviction in that State he was under eighteen years of age. The transcript was competent evidence, and if it be a fact that his serving of a sentence in the penitentiary of another State cannot be considered by the jury under the laws of this State, because at the time of his conviction he was under eighteen years of age, then his testimony raised an issue which could have been dealt with only by instructions. *State v. Levy*, 181.
19. ———: ———: **No Instruction: Not Raised by Motion for New Trial.** If it be an error of the trial court to fail to instruct the jury that the fact, if it were a fact, that defendant was under eighteen years of age when convicted precludes the jury from considering his said former conviction in another State in assessing his punishment, it was an error of omission to instruct, and in order to be available to defendant on appeal his motion for a new trial should contain a specific assignment that the trial court failed to instruct on the point. *Ib.*
20. ———: ———: **Transcript: Not Properly Certified: Untimely Objection.** An objection that the transcript of a defendant's conviction in another State is not properly certified and authenticated under the laws of Congress, comes too late, if made for the first time after the transcript was admitted and read into the record. When improper evidence is offered it is the duty of the party who might be injured by its admission to object specifically then and there by informing the court why it should not be admitted. *Ib.*
21. ———: ———: ———: ———: **Admission of Attorney That Transcript is in Proper Form.** Besides, if when the transcript of defendant's conviction in another State was offered in evidence his attorney informed the court that it was "in proper form," an objection that it was not properly certified and authenticated under the laws of Congress, made after it was admitted and read into the record, should be disregarded, since an admission made by an attorney in open court during the trial of a cause against the interests of his client is presumed to be true. *Ib.*
22. **Robbery: Money: Coins and Bills: Identification: Presumption Arising from Possession.** The prosecuting witness, as

EVIDENCE—Continued.

he boarded a street car, felt "an unusual disturbance" in his trouser's pocket. Before the car started he discovered his pocketbook was gone, and he immediately got off the car. A police officer, on the car, saw defendant hurry through the car and get off at the front end, and his suspicions were aroused, and he also got off in time to see defendant board another car going in the opposite direction. Upon being informed by the prosecuting witness that his pocketbook had been stolen, the officer followed defendant on the next car and overtook him at a cross street as he was coming towards the car track, and when asked what he was doing there he replied that he had gone to that cross street to see a lumberman, but had failed to find him. There was no lumber yard or office in that part of the city. The prosecuting witness testified that he had in his pocketbook when it was stolen, two twenty-dollar bills, one five-dollar bill and a ten-dollar gold piece dated 1902; also five pennies which he had carried for some time as keepsakes, and that they were dirty and one of them of a dark color. When defendant was searched, in one pocket was found a roll of one-dollar bills "nicely folded," and in another two twenty-dollar bills and one five-dollar bill, not folded, but "all crumpled up," and five pennies of the same color and description as those the prosecuting witness had in his pocketbook. No ten-dollar gold piece was found in his pocket, but when his underclothes were removed a ten-dollar gold piece dated 1902 fell out of them. The police officer then went to the cross street where defendant was arrested, and about three hundred feet from where the arrest was made found the empty pocketbook. *Held*, that both coins and bills frequently become so discolored or worn as to give them a peculiar appearance by which they can be identified with reasonable certainty, and the stolen money was sufficiently identified to warrant an instruction on the presumption of guilt arising from possession of recently stolen property. *Ib*.

23. **Cross-Examination of Defendant: Houses of Prostitution in Other Cities: Denied.** Where, in a prosecution of an accused for taking away from her father a girl under eighteen years of age for the purpose of prostitution, the girl has testified that defendant stated to her at the time she entered her house in St. Charles that she had a house of prostitution in Jefferson City, it was not harmful error for the State to ask her on cross-examination if she had and run such a house in Jefferson City, a matter not mentioned in her examination in chief, where defendant answered that she had not. However, if defendant had admitted that she had or had run such a house in Jefferson City a different case would be up for a ruling. And since no objection was made or exception saved to the State's inquiry of her on cross-examination if she had run such a house in Columbia, the propriety of that inquiry cannot be considered on appeal. *State v. Corrigan*, 195.
24. **Testimony of Event Subsequent to Offense: Harmless Error: Presumption that Officer Performed Legal Duty.** Where defendant was being prosecuted for taking a fifteen-year old girl away from her father for the purpose of prostitution, and a deputy sheriff was offered by the State for the purpose of showing that defendant's house was being operated by her

EVIDENCE—Continued.

as a house of prostitution some two or three weeks subsequent to the time the prosecutrix was taken therefrom, and the only testimony of said witness was that as such deputy sheriff he went to said house at the time indicated "with the intention of closing it," leaving as an inference that he did not close it, the error in admitting the testimony was harmless; for, it being presumed that an officer performs his legal duty, the inference is that had the house been operated as one for prostitution he would have closed it, and that he did not close it because upon examination he found it was not being so operated, and therefore the error, in so far as it "was not innocuous, was in defendant's favor." *State v. Corrigan*, 195.

25. **Prior Good Reputation of Prosecutrix.** It would be error to admit evidence on the part of the State of the prior good reputation of prosecutrix before the defendant had attacked her reputation. But testimony brought out by a cross-examination of the State's witness to the effect that the loathsome disease which prosecutrix had when she was taken from defendant's house of prostitution, was contracted before she went to said house, and testimony of defendant's witness that prosecutrix was on her way to another house of prostitution when said witness persuaded her to go with her to defendant's house, was as serious an attack upon prosecutrix's reputation for chastity as would have been the offering of character witnesses to show her bad reputation for chastity, and authorized the State in rebuttal to show her reputation was good. *Ib.*
26. **Taking Away Girl for Prostitution: Intent.** The gravamen of the offense of taking away from her father a girl under eighteen years of age for the purpose of prostitution, is the purpose or intent with which the taking away is accomplished; and intent is a hidden mental process, deducible in a criminal case especially, since the State may not use the defendant to prove it, from words or overt acts alone. *Ib.*
27. ———: ———: **Shown by Sexual Acts.** That the prosecutrix was taken away for the purpose of prostitution can in no way be more clearly shown than by the fact that she was received into defendant's house of prostitution, kept there by defendant, and when occasion offered sent by defendant to a room with a man who gave her money and had sexual intercourse with her. *Ib.*
28. ———: ———: ———: **Act of Rape.** Nor need the act of sexual intercourse be shown to have been voluntary. The fact that it was accomplished by the forceful ravishment of the girl by a drunken man sent to her room by defendant, with all its ugly details, may be shown in evidence, as a part of the *res gestae*. Nor does the fact that the evidence of the rape and a recital of its details may add to the punishment imposed by the jury, render the evidence incompetent. *Ib.*
29. ———: ———: ———: ———: **Res Gestae: Accessory.** The details of the force used by the drunken man, sent to prosecutrix's room by defendant, are parts of the *res gestae* and are admissible against defendant, though the rape was done out of her immediate presence and not specifically commanded by her to be done. An accessory before the fact, who instigates the unlawful act, is liable; and if the acts are *res gestae* they are always admissible even though they show the

EVIDENCE—Continued.

commission of another crime committed in the accomplishment of the crime undertaken. *Ib.*

30. **Impeachment of Witness: Statement out of Court.** Statements made by a witness out of court in conflict with his testimony for the State cannot be used to contradict or impeach the witness unless he is asked while giving his testimony if he made the alleged contradictory statements. *State v. Curtner, 214.*
31. **Exclusion of Evidence: Cured by Subsequent Examination.** Error in excluding evidence of the details of a difficulty between defendant and the prosecuting witness prior to the shooting, is cured by the adroitness of defendant's counsel in eliciting from the witnesses offered the full details of the prior difficulty. *Ib.*
32. **Exhibiting Wounds to Jury.** It is not error to permit the prosecuting witness to exhibit his wounds to the jury, in a prosecution for assault with intent to kill by shooting with a shotgun, whereby said witness lost his eyesight. Such evidence may tend to create prejudice in the minds of the jury, but they have a right to know the result of the assault as an aid in arriving at the proper punishment to be fixed. *Ib.*
33. **Corporations: Formation: Partnership Relation Between Organizers: Must be Established by Proof.** Promoters of a corporation are not prima-facie partners. Their partnership must be established by proof. *Ringolsky v. Mining Co., 241.*
34. ———: ———: ———: ———: **Insufficient.** Where R. T. and G. with others, formed a corporation, each putting in mining property and taking in return stock and bonds of the corporation, evidence *held* not to show that R. and T. were partners. *Ib.*
35. **Probate of Will: Not Entered of Record: Order Made After Many Years.** The Revised Statutes of 1855 provided that the clerk of the county court should take the proof of wills in vacation, subject to confirmation or rejection by the court, and that when any will was exhibited, the clerk might receive the proof and grant a certificate of probate or of rejection. In 1865 a will was presented, and the proof of the subscribing witnesses was written, signed, and certified upon the will itself, which was then filed but not recorded. The court, when it met in term, made an order appointing an administrator *c. t. a.* This suit to quiet title having arisen long afterward, involving the provisions of the will, it was *held* on a former appeal that the proof did not justify the conclusion that the will had been probated. Accordingly the probate court, in 1912, ratified the proceedings of the county clerk, adjudged the instrument proved and ordered it admitted of record. The order and judgment were copied upon the will and signed by the judge. *Held*, that the instrument was thereafter, in the retrial of the suit to quiet title, properly received in evidence as the last will and testament of its signer, and that under it the plaintiffs are entitled to their interests as remaindermen. *Farris v. Burchard, 334.*
36. **Expert Testimony.** Experts are not competent to testify that the proper way for handling mules being led along a public

EVIDENCE—Continued.

- street is to halter them closely together. The matter is not one of expert exposition. *Lyman v. Dale*, 353.
37. ———: **No Objection.** Where the question is not one calling for opinion evidence the case is not changed on appeal by the fact that expert testimony was admitted without objection. *Ib.*
38. **Testimony: Credibility: Theory of Expert: Contradicted by Laymen.** The credit due the testimony of lay witnesses directed to establishing a fact, as against the advisory theorizing of experts, is always for the jury, not the court. It cannot be held that one of plaintiff's testicles was not driven by the accident up into his abdomen and remained there, simply because the doctors testified they never saw or read of an accident of the kind, and that the size of the usual canal, protected, as it is, by muscular rings, excludes the idea that the testicle could be driven by force from nature's sack up and along this canal, where unimpeached lay witnesses, including plaintiff's mother, testified that he was normal in this particular before the accident occurred and abnormal ever afterwards. The testimony of the experts was merely advisory, and the issue of fact was for the jury. *Sang v. St. Louis*, 454.
39. **Future Medical Attention.** Future expenses for physicians rest upon the same ground as the probable loss of future earnings. Where the evidence shows that a hernia and a complicated, compound, comminuted fracture of the leg between the knee and the ankle, resulted from the accident; the medical testimony is that the hernia, though reduced, is likely to recur at any time, and the trouble, when once the abdominal walls are ruptured and the intestines protrude, will with reasonable certainty recur from lifting or even ordinary labor; that the bones of the leg had been somewhat crushed and this crushing made the fracture a comminuted one; that some flesh and ligaments got between the parts of the compound fracture, and this was not discovered at first and caused suppuration and failure to knit, and after the bones were wired together it was several months healing, and at the trial, one year after the accident, there was still pain in the leg and tenderness in the wounded parts, there was sufficient evidence upon which to base an instruction authorizing a recovery "for any expense for medical services which the jury find and believe from the evidence plaintiff is reasonably certain to necessarily incur in the future by reason of his injuries and directly caused thereby;" for it is apparent from the evidence, that medical attention in the future will be reasonably certain to guard the situation or to reduce the recurring hernia or prevent strangulation. *Ib.*
40. **Best Evidence.** No case calls for better evidence than the case admits of. Certain elements of damage may go to the jury though there is no line of testimony by which the fact of damage may be established with absolute certainty. *Ib.*
41. **Taxation: Board of Equalization: Certification of City Assessment: Yields to Land List.** While the certification of a city assessment by the county clerk, who is by statute secretary of the county board of equalization, is a sufficient authentication, yet the corrected land list of the county assessor is the original record of the equalized assessment, and the city assessment must yield to it. *State ex rel. v. Mining Co.*, 490.

EVIDENCE—Continued.

42. **Negligence: No Report of Injury.** It was not reversible error to permit defendant's claim-agent to testify that the custom and due course of business required a report of an accident or injury to a would-be passenger to be made by the street car conductor to defendant's managing officers for their information, and that no such report of the injury to plaintiff's husband was made. But the only relevancy of such testimony is to shed light upon the conduct of defendant in failing to take such steps as prudence would have suggested if it had been informed of the accident. *Tawney v. United Rys. Co.*, 602.
43. **Forcible Entry and Detainer: Deed: No Exception.** Where no exception was saved to the ruling of the court admitting a deed describing the property in suit in an action of forcible entry and detainer brought against the city which claims the land is a part of a public wharf "on the ground that it is offered solely for the purpose of showing that the property in question is part of the public wharf," it will not be *held* on appeal that error was committed in admitting said deed in evidence. On appeal only exceptions ruled in the trial court are considered. *Hafner Mfg. Co. v. St. Louis*, 621.
44. **Objections: General.** An objection to proffered evidence that it is incompetent, irrelevant and immaterial is of no sensible use in the administration of justice, and is unavailing as an assignment of error. *Ib.*
45. ———: ———: **Ordinance: Violative of Constitution and Statutes.** An objection to the admission of an ordinance in evidence to the effect that it is violative of the Constitution and laws of the State, without any designation of what provision of the Constitution or what specific law it contravenes is too general and vague. *Ib.*
46. **Error in Exclusion: Cured by Cross-Examination.** On a trial for embezzlement, error in sustaining an objection to a question whether the prosecuting witness had expected to marry the defendant was cured by the fact that after such ruling the witness was fully cross-examined on that point and stated that there was a prospect that they might marry in the future. *State v. Baker*, 689.
47. **Theory of Defense: Embezzlement.** While it is true that when the evidence in a criminal case tends to establish a defense inconsistent with the testimony of the defendant, he is not bound by his testimony, but is entitled to instructions on the theory shown by the other evidence, yet he may not cause the court and adversary counsel to pursue a certain course and then at the outcome repudiate its legal validity; and accordingly, where a defendant on trial for embezzling \$2000 testified that he never received the sum in question, and his attorneys at the trial said they did not claim it was borrowed money, the testimony of the prosecuting witness at the preliminary examination was properly admitted at the trial, although the examining court had refused to permit her to say whether she had received \$50 for the use of \$200 lent the defendant at another time, thus, the defendant asserts, denying him the right to a full cross-examination, and of the value of a fact, if the question had been affirmatively answered, from which the jury might have inferred that the \$2000 was a loan also. *Ib.*

EVIDENCE—Continued.

48. **Judge's Comment at Preliminary Hearing: Incompetent at Trial: Harmless Error.** Although comment on the evidence by a judge at a preliminary examination is not competent evidence on the trial, yet where the evidence itself was before the jury and clearly bore out the judge's comment, the admission of the judge's expression was harmless error. *State v. Baker*, 689.
49. **Impeaching Witness: Particular Instances of Misconduct.** The character of a witness cannot be impeached by showing through other witnesses special instances of misconduct. *Ib.*
50. **Admissibility: Embezzlement: Defendant Showing Possible Use of Money by Prosecutrix.** Proof that the prosecuting witness, since deceased, whose testimony at the preliminary hearing was read in evidence at the trial of the defendant for embezzlement, had been in trouble with the Federal officers and had hired lawyers to represent her, was not competent without a showing that the lawyers were paid the money the defendant was charged with embezzling. *Ib.*
51. **Order of Proof: Discretion of Court: Embezzlement.** The order of testimony rests largely in the discretion of the trial court, and it is not error to admit in rebuttal testimony which might have been given in chief. *Ib.*

EXCEPTIONS.

1. **Bill of Exceptions: Record Proper: Not Commingled.** Where the abstract bears after the pleadings the statement that "the following entries and matters appear of record proper," followed by orders of court, including those relating to the bill of exceptions, and then by a heading, "Bill of Exceptions," in large, black-faced capitals, preceding such matter as is usually preserved in that form, it will not be held that matter of exceptions and of record proper have been commingled. *Caruthersville v. Huffman*, 367.
2. **Motion to Strike Out: No Exception.** In order that the action of the court sustaining defendant's motion to strike out a part of plaintiff's petition may be reviewed on appeal, it was necessary that an exception be saved to the ruling and be incorporated in a bill of exceptions. A motion to strike out a part of a pleading cannot be considered a demurrer, or a part of the record proper, and cannot be preserved for review as other record matters. *Carder v. Drainage District*, 542.
3. **Remarks of Counsel: No Exception.** Appellant cannot complain if he did not except to the failure of the court to further reprimand counsel for stating as a fact something not shown by the evidence, where the court as soon as the statement was made contradicted it and said his contradiction was made in "correction of the statement of counsel." *Tawney v. United Ry. Co.*, 602.
4. **Evidence: Forcible Entry and Detainer: Deed: No Exception.** Where no exception was saved to the ruling of the court admitting a deed describing the property in suit in an action of forcible entry and detainer brought against the city which claims the land is a part of a public wharf "on the ground that it is offered solely for the purpose of showing that the property in question is part of the public wharf," it will not

EXCEPTIONS—Continued.

be held on appeal that error was committed in admitting said deed in evidence. On appeal only exceptions ruled in the trial court are considered. *Hafner Mfg. Co. v. St. Louis*, 621.

EXCESSIVE PUNISHMENT. See *Verdict*, 1.**FELLOW-SERVANT.**

Master and Servant: "Operating Railroad:" Fellow-Servant Act: Car Repairer. A car repairer while working at his task in the repair yards of a railroad company is "engaged in the work of operating such railroad" within Sec. 5434, R. S. 1909, and is entitled to damages from the company for injuries caused by the negligence of a fellow-servant. *Powers v. Railroad*, 701.

FORCIBLE ENTRY AND DETAINER.

1. **Title.** The rule that in actions of forcible entry and detainer title is not an issue, is to be taken in the sense that title is not tried out as a determinative factor. It does not mean that title is not to be considered for any purpose. *Hafner Mfg. Co. v. St. Louis*, 621.
2. ———: **No Exception.** Where no exception was saved to the ruling of the court admitting a deed describing the property in suit in an action of forcible entry and detainer brought against the city which claims the land is a part of a public wharf "on the ground that it is offered solely for the purpose of showing that the property in question is part of the public wharf," it will not be held on appeal that error was committed in admitting said deed in evidence. On appeal only exceptions ruled in the trial court are considered. *Ib.*
3. **Title: Circumstances: Judgment in Ejectment.** In forcible entry and detainer, the question of lawful possession and unlawful ouster, and not the title to the land, is the matter for adjudication; but what constitutes possession must depend upon circumstances. The records in an ejectment suit, brought by plaintiff's ancestor against the city, in which it was held that a certain tract of land, of which that in suit is a part, was a public wharf belonging to the city, though said part has never been reduced to actual wharf uses, may be offered in evidence for the purpose of showing the character of possession of the plaintiff in the land in suit, since the purposes for which it has been used has an influence in arriving at common-sense conclusions as to whether or not plaintiff has been in possession. If the judgment record in the ejectment suit is not used as a basis for a finding in the unlawful detainer suit, that is, the case is not made to turn on title, the evidence can do no harm. *Ib.*
4. **Public Wharf: is Public Highway.** A public wharf on a navigable stream, connected with public streets and in a sense an extension of such streets, is in the eyes of the law a public highway; and the rights of the city in and its duties towards it are akin to its rights and duties towards its public streets. *Ib.*
5. ———: **Removal of Obstruction.** No person has a right to the exclusive use of a tract of land owned and dedicated by the

FORCIBLE ENTRY AND DETAINER—Continued.

city to public use as a wharf, any more than he has a right to the exclusive use of a public street; and the city has the right, when authorized thereto by its charter and ordinances, to remove any obstructions to such general public use of the wharf tract placed thereon by one asserting an exclusive use thereto. *Hafner Mfg. Co. v. St. Louis*, 621.

6. ———: **Lawfully Possessed.** A complainant in a suit of forcible entry and detainer is bound to make proof that he was lawfully possessed of the premises and that defendant unlawfully entered into and detained the same; and "lawfully possessed" is used in the sense of "peaceable possession." But peaceable possession does not mean possession obtained by force and a strong arm, or in tortious violation of the owner's right, nor does it mean a possession that is a mere sham. *Ib.*
7. ———: ———: **After Suit in Ejectment.** One cannot be said to be in lawful possession of land, after it has been adjudged by a suit in ejectment that his ancestor was not the owner, but that it was a part of a tract belonging to the city and dedicated to public use for wharf purposes, who piled lumber thereon, and then before the city undertook to remove obstructions therefrom and in contemplation thereof removed all his lumber except a few weather-stained boards and some stakes used in piling. *Ib.*
8. ———: **Unlawful Detainer: City.** It cannot be said that a municipal corporation, which, in the exercise of its charter and ordinance right to remove obstructions from public wharfs and streets, removes a few weather-stained plank and piling stakes from a part of a tract of land which has been adjudged by suit in ejectment to belong to it and has by it been dedicated to a public wharf, has thereby "unlawfully entered into and detained" said premises. *Ib.*
9. ———: ———: ———: **Improvement.** Nor is the question of complainant's lawful possession or the city's unlawful entrance affected by the fact that the city had not improved so much of the public wharf as complainant claims, but had improved the balance. *Ib.*
10. ———: **Selling Complainant's Personal Property Thereon.** Nor is the action of forcible entry and detainer to be affected in any wise by the fact that the city, in the exercise of its municipal right to remove obstructions from a public wharf, in entering upon the land to remove the obstructions seized certain lumber belonging to complainant and sold it at public auction. Damages on that score cannot be awarded in such a suit. *Ib.*

FORECLOSURE SALE, SETTING ASIDE. See *Mortgages and Deeds of Trust*.

FORMER ADJUDICATION.

1. **Action by State for Taxes.** The doctrines of *res judicata* and estoppel by judgment apply to actions by the State for the collection of taxes. And an adjudication is not only conclusive against the State as to the very taxes which were its subject, but its effect extends to those incidental questions actually and necessarily decided in reaching the judicial result. *State ex rel. v. Mining Co.*, 490.

FORMER ADJUDICATION—Continued.

2. ———: **Matters Concluded.** Where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit between the same parties upon a different claim or demand, the inquiry must always be as to the point or question actually litigated and determined in the original action, not as to what might have been thus litigated and determined. Only upon such matters is the judgment in the first action conclusive in the second. *Ib.*
3. **Incorporation of Town by County Court: Judicial Act.** The incorporation of a town by the county court by authority of Laws 1871, p. 85, is a judicial act. *Ib.*
4. ———: ———: **Cannot Be Collaterally Attacked.** An order of the county court incorporating a town by authority of Laws 1871, p. 85, cannot be collaterally attacked, as, by way of defense to an action by the State for taxes. *Ib.*
5. ———: ———: **Matters In Attack to be Plead.** To assail an order of the county court incorporating a town or city, all essential infirmities and omissions therein must be alleged and proved with the same strictness that would be required in a bill in equity to amend a final judgment of a court of record for fraud or collusion. *Ib.*
6. **Matters Concluded: Action by State for Taxes: Incorporation of Town.** Where certain city taxes assessed against defendant's property were held invalid on the theory that the ordinance of incorporation as a city of the fourth class was unreasonable in including such property, and the original order of incorporation as a town by the county court, which also included defendant's property, was not pleaded or in issue, the judgment is not conclusive, in a subsequent suit for other taxes, of the question whether defendant's property was rightly included in the city by the county court's order of incorporation. *Ib.*

FORMER CONVICTION.

1. **Under Eighteen Years of Age: Evidence.** The transcript of the indictment and the judgment showing defendant has been convicted of burglary in another State, is not incompetent on the sole ground that defendant has testified that at the time of his conviction he was under eighteen years of age, and therefore under the laws of this State he could not have been sentenced to the penitentiary. The jury is never precluded by the oral testimony for either the State or defendant, and was not compelled to believe defendant's testimony, though, uncontradicted, that at the time of his conviction in that State he was under eighteen years of age. The transcript was competent evidence, and if it be a fact that his serving of a sentence in the penitentiary of another State cannot be considered by the jury under the laws of this State, because at the time of his conviction he was under eighteen years of age, then his testimony raised an issue which could have been dealt with only by instructions. *State v. Levy, 181.*
2. ———: **No Instruction: Not Raised By Motion for New Trial.** If it be an error of the trial court to fail to instruct the jury that the fact, if it were a fact, that defendant was under eighteen years of age when convicted precludes the jury from considering his said former conviction in another State in assessing his

FORMER CONVICTION—Continued.

punishment, it was an error of omission to instruct, and in order to be available to defendant on appeal his motion for new trial should contain a specific assignment that the trial court failed to instruct on the point. *State v. Levy*, 181.

3. ———: Transcript: Not Properly Certified: Untimely Objection. An objection that the transcript of a defendant's conviction in another State is not properly certified and authenticated under the laws of Congress, comes too late, if made for the first time after the transcript was admitted and read into the record. When improper evidence is offered it is the duty of the party who might be injured by its admission to object specifically then and there by informing the court why it should not be admitted. *Ib.*
4. ———: ———: ———: Admission of Attorney That Transcript is in Proper Form. Besides, if when the transcript of defendant's conviction in another State was offered in evidence his attorney informed the court that it was "in proper form," an objection that it was not properly certified and authenticated under the laws of Congress, made after it was admitted and read into the record, should be disregarded, since an admission made by an attorney in open court during the trial of a cause against the interests of his client is presumed to be true. *Ib.*

FRAUD.

1. Suit to Recover Decedent's Personal Property: Cannot Be Maintained by Heirs. The heirs of decedent, so long as his widow is administratrix, cannot maintain suit to recover the value of a stock of merchandise out of which he was fraudulently cheated by defendants—not even by joining the administratrix, on her refusal to sue, as a defendant. Such suit can only be maintained by the administratrix as plaintiff; and if she refuses to sue, the remedy of the heirs is to sue on her bond, or to bring proceedings in the probate court to have her removed as administratrix and another appointed in her stead. *Toler v. Judd*, 344.
2. Drainage District: Injunction: Misrepresentation as to Costs and Location. The work of constructing and maintaining a drainage district cannot be halted for that some of the men who afterwards became supervisors, in circulating the petition for the incorporation of the district for signatures among the landowners, represented to them that the cost of excavation would not exceed seven cents per cubic yard and that the main drainage ditch would be located on low ground or along a certain line. At that time the men were not members of the board of supervisors, and any misrepresentations they made are not binding on the district subsequently organized. *Carder v. Drainage District*, 542.
3. ———: Cost of Construction. The circuit court, in which the proceeding for the incorporation of a drainage district is begun and finally consummated, judicially determines, upon the presentation of a petition by landowners for articles of incorporation, whether the costs of the proposed improvement will be out of proportion to the benefits that will accrue both to the district as a whole and the several parcels of land therein; if the court finds the estimated costs will exceed the benefits

FRAUD—Continued.

it disapproves the report of the commissioners appointed to determine the question of damages and benefits, and thereupon the incorporation is dissolved; and these things the petitioners are presumed to know and have in mind when they attach their names to the petition. Therefore, the estimated cost of the landowners who circulated the petition, that the total cost will be so much per cubic yard or so much per acre, whether their estimate was too large or too small, cannot be used to imperil the corporation or to destroy it, or to stop the work of construction. *Ib.*

FRAUDULENT CONVEYANCES.

1. **Purpose: Full Value: Wife Preferred.** Even though the grantor was hopelessly insolvent, at the time he conveyed the property to his wife, and the evidence tends strongly to prove the transfer was made to defraud his other creditors, yet if the grantor was justly indebted to the wife at the time, and the sum of that indebtedness, together with the existing mortgages against the property which she assumed, aggregated an amount equal to or in excess of its then value, the conveyance to her will not be set aside as fraudulent as to his other creditors. *Wellman v. Kaiser Inv. Co.*, 285.
2. **Valid Indebtedness: Breach of Promise Notes: Future Marriage.** The fact that a transfer of his property by the husband to his wife was made in consideration in part of the surrender to him of notes given by him to her in settlement of her suit for breach of his promise to marry her brought by her against him prior to their marriage, does not render the conveyance fraudulent, nor did the subsequent marriage invalidate such indebtedness. *Ib.*
3. ———: ———: ———: **Presumption of Gift: Lending Notes to Be Used as Collateral Security.** In view of the statute declaring that all gifts of money or property by the wife to her husband not in writing shall be void, a delivery to him by her of notes of a third party given her by him in settlement of her suit for breach of his promise to marry her brought before their marriage, would ordinarily raise the presumption of payment, but where it is clear that her intention was to lend the notes to him in order that he might use them as collateral security for the payment of money to be borrowed by him, no presumption of payment will be indulged. *Ib.*

GIFT TO OR BY WIFE. See *Husband and Wife*.

GUARDIAN AND CURATOR.

Appellate Jurisdiction: Contest Between Guardians: Amount in Dispute. The Supreme Court does not have appellate jurisdiction of an appeal from a judgment of a court of equity decreeing that an Iowa guardian of an insane person whose domicile is in that State is not entitled to have the administration of the Missouri guardian closed and all the assets turned over to him, where the value of her estate in this State amounts to only \$10,000. Neither guardian owns the fund in his own right; both are trustees, and she is the beneficial owner; the value of the right to the custody of the fund, in either, depends upon the perquisites, emoluments and fees of his trusteeship falling to him in administering the estate, and the value of those things

GUARDIAN AND CURATOR—Continued.

is "the amount in dispute" between them, and that value cannot by any legal estimate amount to \$7500, where the assets are worth only \$10,000. *Bowles v. Troll*, 377.

HEIRS, RIGHT TO SUE. See *Parties to Action*.

HIGHWAYS. See *Roads and Highways*.

HUSBAND AND WIFE.

1. **Fraudulent Conveyance: Purpose: Full Value: Wife Preferred.** Even though the grantor was hopelessly insolvent at the time he conveyed the property to his wife, and the evidence tends strongly to prove the transfer was made to defraud his other creditors, yet if the grantor was justly indebted to the wife at the time, and the sum of that indebtedness, together with the existing mortgages against the property which she assumed, aggregated an amount equal to or in excess of its then value, the conveyance to her will not be set aside as fraudulent as to his other creditors. *Wellman v. Kaiser Inv. Co.*, 285.
2. ———: **Valid Indebtedness: Breach of Promise Notes: Future Marriage.** The fact that a transfer of his property by the husband to his wife was made in consideration in part of the surrender to him of notes given by him to her in settlement of her suit for breach of his promise to marry her brought by her against him prior to their marriage, does not render the conveyance fraudulent, nor did the subsequent marriage invalidate such indebtedness. *Ib.*
3. ———: ———: ———: ———: **Presumption of Gift: Lending Notes to Be Used as Collateral Security.** In view of the statute declaring that all gifts of money or property by the wife to her husband not in writing shall be void, a delivery to him by her of notes of a third party given her by him in settlement of her suit for breach of his promise to marry her brought before their marriage, would ordinarily raise the presumption of payment, but where it is clear that her intention was to lend the notes to him in order that he might use them as collateral security for the payment of money to be borrowed by him, no presumption of payment will be indulged. *Ib.*

INDICTMENT AND INFORMATION.

1. **Felonious Intent.** An information which, after alleging the assault was feloniously made with a shotgun, and that the shooting and striking were done feloniously, states that the assault and shooting were done "with the intent then and there him the said Herod Williams on purpose and of his malice aforethought feloniously to kill and murder," sufficiently charges felonious intent to kill by means of a firearm. *State v. Mace*, 143.
2. **Shotgun: Judicial Knowledge.** The courts judicially notice the dangerous and deadly nature of a shotgun and other like firearms. But that is not true of a rock, club and some other weapons. *Ib.*
3. **Venue: Stated in Margin.** It is sufficient that the venue be named in the margin or caption of an indictment. *State v. Fields*, 158.

INDICTMENT AND INFORMATION—Continued.

4. ———: Time: Not of Essence of Offense: Killing Animal With Intent to Steal It. Time is not of the essence of the offense of wilfully killing an animal with intent to steal it, and therefore an indictment is not invalid that fails to state the time when an alleged offense of that kind was committed. *Ib.*
5. Local Option Law: Allegation of Adoption in County. An information, attempting to charge a violation of the Local Option Law, is not sufficient unless it charges both that the law has been adopted and is in force; nor would it be sufficient if it charged only that it had been adopted, for it may have been adopted and never put into force for lack of the necessary statutory notice. But if it charges that the law "was in full force and effect" in the county where the offense was committed, designating it by article and chapter, it charges that it had been adopted and was in force, for it could not well be in full force and effect unless it had been adopted. *State ex rel. v. Robertson*, 613.
6. ———: Conflict in Opinions: Certiorari. The last previous decision of the Supreme Court, and its previous rules as well, was to the effect that an indictment or information charging a violation of the Local Option Law must charge that the law had been adopted and was in force and effect in the county; and therefore a decision of the Court of Appeals holding that an information charging that the said law was at the time the offense was committed "in full force and effect in the county" was sufficient, was not in conflict with the last previous decision of the Supreme Court on the subject, but in harmony therewith, and its said decision will be upheld upon *certiorari*. *Ib.*

INJUNCTION.

1. Trespass: Forcible Seizure of Corporate Property: Discretion: Prohibition. The circuit court has jurisdiction of the subject-matter of issuing a temporary injunction to restrain a forcible and continuous trespass upon the property of a corporate lodge by the officers of the supreme organization and others, and the confiscation of its lodge furniture and money in bank, to be followed by a permanent one or by a dissolution thereof, on the application of equitable principles to the facts ascertained on final hearing, on answer or motion to dissolve; and having jurisdiction of the parties, the presence of those things is an insurmountable barrier to the issuance of a writ of prohibition before there has been any demurrer or answer, or motion to dissolve, unless, in some way, the court is proceeding in excess of that jurisdiction. *State ex rel. v. McQuillin*, 256.
2. ———: ———: ———: Cause of Action. The contention that the bill for injunction did not state facts sufficient to constitute a cause of action will not authorize prohibition, where the bill is either demurrable and no demurrer has been filed, or is subject to a motion to make more definite and certain and no such motion has been filed; for, in such cases, the Supreme Court is bound to assume that, if the trial court is given an opportunity to rule on the demurrer or motion, it will rule correctly, and it will not anticipate its ruling, or permit prohibition to be used to permit correction, in advance of its anticipated erroneous rulings. *Ib.*

INJUNCTION—Continued.

3. **Implied Easement: Obstruction.** For the reason stated in *Bussmeyer v. Jablonsky*, 241 Mo. 681, the judgment in this case in which plaintiff wishes to enforce an implied easement conferred upon one piece of property by the owner of the adjoining piece, and to enjoin the defendants from obstructing the entrance to a three-foot passageway upon a lot owned by defendants, is reversed, the facts and issues being the same. *Jablonsky v. Wussler*, 320.
4. **Drainage District: Fraud: Misrepresentation as to Costs and Location.** The work of constructing and maintaining a drainage district cannot be halted for that some of the men who afterwards became supervisors, in circulating the petition for the incorporation of the district for signatures among the landowners, represented to them that the cost of excavation would not exceed seven cents per cubic yard and that the main drainage ditch would be located on low ground or along a certain line. At that time the men were not members of the board of supervisors, and any misrepresentations they made are not binding on the district subsequently organized. *Carder v. Drainage District*, 542.
5. ———: ———: **Cost of Construction.** The circuit court, in which the proceeding for the incorporation of a drainage district is begun and finally consummated, judicially determines, upon the presentation of a petition by landowners for articles of incorporation, whether the costs of the proposed improvement will be out of proportion to the benefits that will accrue both to the district as a whole and the several parcels of land therein; if the court finds the estimated costs will exceed the benefits it disapproves the report of the commissioners appointed to determine the question of damages and benefits, and thereupon the incorporation is dissolved; and these things the petitioners are presumed to know and have in mind when they attach their names to the petition. Therefore, the estimated cost of the landowners who circulated the petition, that the total cost will be so much per cubic yard or so much per acre, whether their estimate was too large or too small, cannot be used to imperil the corporation or to destroy it, or to stop the work of construction. *Ib.*
6. ———: **Conspiracy to Locate Ditch.** A conspiracy between the members of the board of supervisors to locate the drainage canal in such a way as to favor the interests of themselves and of other landowners, which the evidence shows failed of its purpose, the result being that the ditch was not located where they desired it located, will not authorize a decree enjoining the construction and maintenance of the ditch. *Ib.*
7. ———: ———: **Barren of Results.** A barren and abandoned conspiracy, sounding in words but void of substance in either acts or results, is not actionable, unless there is a statute making it actionable. *Ib.*
8. ———: ———: **Power to Restrain by Injunction.** Whether or not an alleged conspiracy formed between the supervisors after the district has been organized, to locate the drainage canal in a way to benefit most largely their own lands to the injury of others, will authorize a decree enjoining the construction and maintenance of the ditch, will not be decided where the evidence affirmatively shows that such conspiracy, if it ever

INJUNCTION—Continued.

existed, was barren of results. But it would seem that Secs. 5514, 5515, 5518a, R. S. 1909, make it unnecessary to resort to the extraordinary remedy by injunction, though that is not decided. *Ib.*

INSTRUCTIONS.

1. **Will Contest: Definition of Incapacity.** An instruction which omits some of the elements of incapacity, and thereby prescribes less soundness of mind than the law requires, is not an error of which proponent can complain, since the error is one in her favor. *Heinbach v. Heinbach*, 69.
2. ———: **Comment on Evidence: Capacity to Make Contract.** An instruction which picks out certain isolated acts of business transacted by testator and ignores others done wholly or partly by him, is an erroneous comment on the evidence. And an instruction that tells the jury that "notwithstanding he was able to transact some business, signing leases, giving checks and receipts, yet unless the jury find from the evidence he possessed a mind and memory sufficiently clear and unimpaired to take into consideration all his property," etc., and ignores other business acts shown by the evidence to have been transacted by him during the time he is said to have been afflicted with senile and alcoholic dementia, such as the purchase of a house, the purchase of a piano on a contract of time-payment by installments, and the execution of divers dramshop bonds, is such an instruction. Nor is it held that a specific mention of all these business acts would have cured the unwarranted mentioning of some of them. The effect of the instruction was to tell the jury that all these business acts went for naught in the scale of sanity, unless the jury went further and found that he "possessed a mind and memory sufficiently clear and unimpaired to take into consideration all his property," etc.; and in effect told the jury that though testator may have been mentally capable of making a contract, it did not follow that he was capable of making a will; and in a close case, is reversible error. *Ib.*
3. ———: **Incapacity: Numerous Definitions.** Numerous instructions defining testamentary incapacity should not be given. Different and dissimilar definitions are misleading. *Ib.*
4. ———: **Refused: Points Already Covered: Appeal.** An appellant cannot complain because of the refusal of his instructions upon points covered by like instructions given by the court. *Springfield v. Owen*, 92.
5. **Stealing Chickens: Definition of Grand Larceny.** An instruction defining grand larceny which omits the fact that the chickens must have been taken in the nighttime to have constituted grand larceny, is immaterial and harmless, if the words "grand larceny" do not appear in any other instruction, and the jury were not required to find the defendant guilty of grand larceny, and the only issue under the evidence was whether defendant stole the chickens, and that issue was presented in a proper instruction. *State v. Walls*, 105.
6. **Exhibiting Dangerous Weapon: "Exhibit."** The word "exhibit" as used in an instruction defining the offense of exhibiting a dangerous weapon in a rude, angry, and threatening

INSTRUCTIONS—Continued.

manner is not of technical import; it is a plain English word that needs no definition. *State v. Nichols*, 113.

7. **Larceny: No Felonious Intent: Steal.** An instruction setting forth the elements of larceny, which omits the words "with a felonious intent," or words of equivalent meaning, is erroneous. At common law a felonious intent was a constituent element of larceny, and by statute the common law is in force in this State and is the only rule of decision until it has been abrogated or changed by statute, and for at least ninety years the statute concerning larceny has contained the words "feloniously steal, take and carry away," etc. *State v. Rader*, 117.
8. ———: ———: **Words of Equivalent Meaning: Steal.** Larceny is an exception to the general rule, which is that the words "felonious" and "feloniously" need not be used in an instruction, and if used they need not be defined. An instruction for grand larceny ought to require the trial jury to find that the taking was with a felonious intent, but the specific use of the word "felonious" or "feloniously" is not absolutely necessary. Words of equivalent meaning may be used instead; but the word "steal" is not an equivalent.
Held, by WALKER, J., that where the instruction contains the words "unlawfully steal, take and carry away" the words "with felonious intent" are not only not necessary, but their use would be both redundant and tautological. *Ib.*
9. ———: ———: **Accessory.** Defendant, while confined in calaboose for a misdemeanor, hired Bell to feed and attend to his horses kept in a barn. The feed running short, defendant directed Bell to go to a neighbor's barn and get corn and alfalfa. Bell did so, committing grand larceny, and concealed the articles in defendant's barn. Bell at first denied that defendant was connected with the larceny, but later confessed, and testified he stole the corn and alfalfa at defendant's direction and procurement; defendant testified that he directed Bell to buy the feed, not to steal it. The case is close upon its facts. *Held*, that defendant was entitled to a specific instruction requiring the jury to find that defendant, in the alleged procurement of said Bell to commit the larceny charged, acted with a felonious intent. An accessory before the fact must in all cases act with a criminal intent, and where the crime charged is grand larceny he must have acted with a felonious intent. *Ib.*
10. **Assumption of Larceny: Accessory.** Where defendant is being tried as an accessory to a grand larceny committed by Bell, and Bell swears he did steal the things charged, and defendant does not deny or controvert the theft, but denies his guilty connection therewith, it is not error for the State's instructions to assume that Bell stole the things. *Ib.*
11. **Robbery: Recent Possession.** An instruction set out in paragraph three of the opinion, on the subject of recent possession of stolen money and the duty of defendant to explain his possession of it, does not assume that the money found in possession of defendant was the identical money stolen from the prosecuting witness, but requires the jury to find that the money found in defendant's possession was recently stolen from such witness before they are permitted to presume that defendant was the party who stole it. *State v. Levy*, 181.

INSTRUCTIONS—Continued.

12. **Former Conviction: No Instruction: Not Raised by Motion for New Trial.** If it be an error of the trial court to fail to instruct the jury that the fact, if it were a fact, that defendant was under eighteen years of age when convicted precludes the jury from considering his said former conviction in another State in assessing his punishment, it was an error of omission to instruct, and in order to be available to defendant on appeal his motion for a new trial should contain a specific assignment that the trial court failed to instruct on the point. *Ib.*
13. **Failure to Give Defendant's: Covered by State's: Enticing Female to Prostitution.** In a prosecution for taking away from her father a certain female under the age of eighteen years for the purpose of prostitution, it was not error to refuse to instruct the jury that if said girl went to the house of defendant with Lillian Cameron under the circumstances and conditions testified to by said Lillian the verdict must be for defendant, where the court instructed the jury that unless they found that the defendant took said girl from her father "for the purpose of prostitution as mentioned in this instruction, you will find her not guilty," there being no proof of a conspiracy or any connection between defendant and Lillian Cameron until prosecutrix was in defendant's house; for, although it be conceded that said instruction, though a vicious comment on the evidence and therefore not in proper form, pertained to a proper matter of defense which was complete if Lillian Cameron's testimony was true and therefore it was the duty of the court to give a proper instruction on the subject, yet the very substance of the instruction requested was embodied in the one given. *State v. Corrigan, 195.*
14. **Taking Away Girl for Prostitution: No Definition of Taking Away, Etc.** An instruction telling the jury that if defendant did unlawfully and intentionally take away the fifteen-year old girl from her father, "for the purpose of prostitution, by having illicit intercourse with divers men," etc., thereby fully incorporating the language of the statute, is not erroneous because it does not go further and define the words "taking away for the purpose of prostitution" by stating that such taking away might have been accomplished by persuasion, enticement or inducement of money offered or means furnished by defendant; for, though said additional explanation might have been proper in view of the evidence, if its omission was an error, it was one in defendant's favor. *Ib.*
15. **Assault: Decree.** Section 4482, Revised Statutes 1909, does not purport to include any class of assaults except those for which no punishment has been prescribed by preceding sections, and as the crime of assault with intent to kill by shooting at a human being is specifically prohibited and the punishment therefor prescribed by section 4481, it is not error to decline to instruct upon the crime of assault denounced by section 4482 where defendant is charged with the offense denounced by section 4481. *State v. Curtner, 214.*
16. **Punitive Damages: No Actual Damages.** Punitive damages may be recovered where a proper basis therefor is laid in the petition and proved, although the plaintiff recover only nominal actual damages. *Keller v. Summers, 324.*

INSTRUCTIONS—Continued.

17. ———: **Recovery on Grounds Not Pleaded: Fraud: Larceny.** Where the petition charged that defendants obtained plaintiff's certificate of deposit for \$300 by fraud, conspiracy and procuring him to become drunk and a party to a gambling game, but did not impute to them the technical crime of larceny, an instruction, properly hypothesizing the conditions upon which he can recover actual damages, is error if it authorizes the jury to return a verdict for punitive damages if they believe the defendants had stolen the certificate. *Keller v. Summers*, 324.
18. **Public Road: Measure of Damages: Fences: Twice Added.** In estimating the damages to a landowner caused by constructing a public road through his land, the jury may be instructed that, in estimating his damages, they may take into consideration the cost of building a new fence, when such fence is necessary; but they should not be told to "consider the quantity and value of the land taken for the road, and also the cost of building the necessary fences along said road, and damage to the whole tract of land of which that taken forms a part, and from the sum of these deduct the benefits peculiar to such tract;" for that is, in effect, by loose language, to tell them to add the cost of the fence to the sum of the value of the land taken and damage to that not taken, when, in fact, the cost of fencing is but one of the elements that go to swell the owner's damage. *Howell v. Jackson County*, 403.
19. ———: ———: ———: ———: **Error Corrected on Appeal.** Where the verdict is swollen by a definitely ascertained and segregated erroneous amount, the false item may be eliminated by excision, by requiring a *remittitur*. Where the instruction authorized the jury to return a verdict for the value of constructing a fence made necessary by the establishment of a public road, in addition to the value of the land taken and damage to that not taken, and all the witnesses agree on the cost of such a fence, that cost will be deducted from the gross amount of the verdict for damages, as a condition of affirmance. *Ib.*
20. **Pleading: Proof: Surplusage.** Proof is required of those allegations only that are necessary to a recovery, and those unnecessary to that end may be eliminated as surplusage. *Weasel v. Lavender*, 421.
21. ———: ———: ———: **Action for Ravishing Unconscious Female: Cause of Unconscious State: Not an Issue.** Where the petition in an action for damages for ravishment alleged that the defendant, a physician, administered medicine to the plaintiff while she was sick in bed, and she having become unconscious under the influence of the medicine, the defendant had sexual intercourse with her, the cause of the plaintiff's unconsciousness was not an issue, and the giving of an instruction requiring a finding that it resulted from the medicine was reversible error. *Ib.*
22. **Action for Ravishment: Female's After-agreement to Keep Silent: Her Testimony.** Where there is reversible error in an instruction, a verdict for the defendant in an action for damages for ravishment will not be affirmed on the ground that the testimony of the plaintiff, who had agreed to keep silent in consideration of a payment to be made to her by the defendant, was unworthy of belief. *Ib.*

INSTRUCTIONS—Continued.

23. **Medical Services: Nominal Damages: Request for Limit to Must Be Made by Defendant.** If there is some substantial evidence that future medical services will be necessary, and defendant is of the opinion that it is not sufficient to support a finding of actual damages, it is its duty, if it wishes to limit plaintiff's recovery to nominal damages on that score, to ask an instruction to that effect. *Sang v. St. Louis*, 454.
24. ———: ———: **Modest Sum: Elements Unsupported by Evidence.** Where the evidence established serious and permanent injuries and the verdict is for a modest sum and is absorbed by referring it to damages plainly suffered and about which there can be no speculation, it would be trifling with justice to suppose the jury allowed anything of substance on the issue of future medical services; and though the instruction permits a finding for future medical services, the verdict will not be reversed on the ground that the evidence fixes no definite amount or character of services to be rendered. *Ib.*
25. **Injury to Employee: Duty of Master to Procure Physician: Proximate Cause of Injury: Instruction.** In a suit for damages for negligent failure by an employer to furnish a dangerously injured employee prompt medical assistance, an instruction should not tell the jury that if they are unable to determine whether the deceased would have died from the injury received, even though proper medical assistance had been promptly furnished him, then they should find for the defendant. Such an instruction raises a purely metaphysical speculation, since no man can answer it with certainty. The law is that as soon as the dangerous injury occurred, while the employee was in the discharge of his work for the master, it became the master's duty, in the emergency, to use diligence to provide medical treatment for him, and if the evidence shows his negligent failure to employ reasonable efforts to do so in all reasonable probability was the proximate cause of the employee's death, the master is liable. On the other hand, the court should instruct the jury for defendant that if they believe from the evidence that the injury was the direct and proximate cause of his death, the master is not liable. *Hunnicke v. Quarry Co.*, 560.
26. **Negligence: Legal Presumption of No Negligence: Modification.** An instruction for defendant stating to the jury the legal presumption that the injury or accident was not "due to any fault or want of care on the part of defendant," if it goes on to tell them to disregard the legal presumption if they believe the evidence introduced by plaintiff in support of her cause of action, but to find for defendant if they disbelieve it, or if they believe the weight of the evidence to be with defendant on the issue of negligence, or if the conflicting evidence simply creates an equilibrium of proof, is not erroneous. *Tawney v. United Railways*, 602.
27. ———: **Injured "In Any Other Way."** An instruction for defendant that tells the jury that plaintiff cannot recover if her husband was injured "in any other way" than as set forth in the allegations of specific negligence contained in the petition, is not error, even though there is evidence that he was injured by malarial fever, if other instructions require the jury in unmistakable terms to confine their attention to the specific injuries alleged. *Ib.*

INSTRUCTIONS—Continued.

28. ———: **Converse of Plaintiff's.** If plaintiff is given an instruction on the theory that if the street car started prematurely defendant was chargeable with his injury, defendant is entitled to one submitting the converse theory, namely, whether the car upon which plaintiff's husband desired to embark stopped a reasonable time to permit him to do so with safety, even though there is no testimony that he "waited an unreasonable time before attempting to board the car." *Tawney v. United Railways*, 602.
29. **Assault and Battery: Self-defense: Error Invited by Complainant.** A plaintiff in an assault case who asked and was given instructions submitting the issue of self-defense, will not be heard to contend upon appeal that that issue was wrongfully injected into the trial. *Thummel v. Surplus*, 651.
30. ———: ———: **Threatening Language: Evidence.** Where, in an action for assault and battery, the defendant testified that when he alighted at the plaintiff's gate, after saying he had come to dig potatoes, the plaintiff "stepped right up and said, 'No you won't dig them,'" and that then they both drew back and struck at each other and the plaintiff went down, the trial court did not err in instructing the jury to inquire whether the plaintiff used violent and threatening language toward the defendant, and in an angry and threatening manner and within striking distance drew back his hand to strike him. In judging whether the language was violent and threatening the jury were not confined to the tone of voice in which the words were uttered, but could take into consideration the acts and gestures accompanying it and even its culmination in immediate violence, the real question being whether it gave the defendant reasonable ground to believe, and he did believe, that the plaintiff intended to do him bodily harm. *Ib.*

INTERSTATE COMMERCE.

1. **Mercantile Agent.** A mercantile agent who, as the agent of a foreign corporation, goes from house to house and obtains orders from residents for coffees, teas and groceries, and sends them to his principal in another State, which fills them by making up separate packages for each order, and sends them to said mercantile agent, who delivers them in the unbroken package to the persons who have ordered them and receives the money therefor, which he transmits to his principal, is engaged in interstate commerce; and an ordinance which seeks to punish him for engaging in such business without a license, is unenforceable as to him or others engaged in a like business. [Following *Jewel Tea Company v. Carthage*, 257 Mo. 383.] *Fleming v. Mexico*, 432.
2. **Empty Cars.** The hauling by an interstate railroad of a train of empty freight cars from a point in one State to a point in another State, is interstate commerce. The fact that the cars are empty does not make the shipment any the less interstate than it would be were they loaded either with articles of commerce or passengers. *Thompson v. Railroad*, 468.
3. ———: **Injury to Fireman: U. S. Employers' Liability Act.** The right of a widow of a fireman for a train of empty cars being hauled by an interstate railroad from a point in one State to a point in another State, to recover for his negligent death, caused by a collision of his train with another, is dependent on

INTERSTATE COMMERCE—Continued.

the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act. Where said act is invoked and the shipment and road are interstate, the plaintiff's right to recover is regulated thereby, and not by the State Damage Act (Sec. 5425, R. S. 1909.) *Ib.*

JUDGMENTS.

1. **Nii Dicit: After Amended Petition Filed: Statute Authorizing Correction of Mistake.** Sec. 1848, R. S. 1909, declaring that the court, at any time before final judgment, in furtherance of justice, and on such terms as may be proper, may amend any pleading by correcting "a mistake in any other respect," authorizes the court to permit plaintiff in ejectment to file an amended petition changing the description of the land sued for; and a record entry showing that "leave is granted plaintiff to file an amended petition correcting error in description" is a finding by the court that a mistake was made in the description of the land in the original petition, and those things appearing it will not be held that the amended petition was the substitution of a new and different cause of action. *Broyles v. Eversmeyer*, 384.
2. **Motion in Arrest: Erroneous Judgment.** In order to raise the point on appeal that the judgment is erroneous in that it is not responsive to the issues, there must be a motion in arrest. *Howell v. Jackson County*, 403.
3. **Founded on Different Statutes.** A decision of the Court of Appeals founded on certain ordinances cannot be held to be in conflict with prior decisions of the Supreme Court founded on different statutes or ordinances. *State ex rel. v. Robertson*, 535.
4. **Erroneous Ruling.** A judgment of a Court of Appeals cannot be quashed by the Supreme Court upon *certiorari* upon the sole ground that it is erroneous and places a wrong construction upon a statute. The jurisdiction to quash must be based upon the failure of the Court of Appeals to follow the last controlling decision of the Supreme Court upon the particular issue decided by the Court of Appeals. *Ib.*

JUDICIAL ACTION.

Party Candidate: Political Allegiance: Not Question for County Clerk. It is not for the county clerk to determine that the attempted substitution upon its party ticket of a candidate of another party for the same office, by the county committee, in the stead of its own nominee who has resigned, is in violation of Sec. 5848, R. S. 1909, providing that "no committee shall have the power to substitute, to fill any vacancy, the name of any person who is not known to be of the same political belief and party as the person for whom he is substituted." That section lays a duty upon the party committee, but it lays none on the county clerk, and it does not authorize him to exercise the judicial function of saying that the person substituted is known not to be of the same political belief and party as the person for whom he is substituted. *State ex rel. v. Seibel*, 220.

JURIES AND JURORS.

1. **Challenge.** An attempted challenge of a venireman in his *voir dire* examination, in the words, "The defendant's counsel object to the juror; challenge him for cause," is the same as no challenge at all. A challenge for cause must be specific and point out the ground or reason for the challenge. *State v. Mace*, 143.
2. ———: **Unnecessary Hazard.** But while such an attempted challenge cannot be considered on appeal, it is observed that courts and prosecuting attorneys, without reason, often do the unwise and unnecessary thing of hazarding a prosecution upon the retention of a juror whose competency is uncertain, when it is always possible, usually from by-standers, to secure jurors about whose fairness and impartiality there can be no question. *Ib.*
3. **Prior Opinion: Directed to Crime and Not to Defendant.** An expression by a trial juror indicating he entertained strong prejudice against the crime committed, by whomsoever committed, but not directed towards defendant, does not disqualify him, if upon his *voir dire* he testifies he has formed no opinion of defendant's guilt or innocence and will give him a fair trial. So that where a witness, by affidavit, in support of a motion for a new trial, swore that she heard one of the trial jurors say "a fellow like that ought to be sent to the penitentiary," and the juror, in a counter affidavit, swore that he was at the store at the time named, that a message came over the telephone that the prosecuting witness was fatally wounded and his wife was dying, that it was reported that the shooting had been done by defendant's father, that other persons present expressed the opinion that a person who would commit an act such as was detailed over the telephone should be in the penitentiary, but that he had no recollection of having made any such remark himself and if he did it was based on the telephone report, and that at no time or place prior to the trial had he said defendant was guilty, but that whatever he may have said was to the effect that if a person was guilty of such an act he should be in the penitentiary, and said juror on his *voir dire* had sworn he had formed no opinion, and the trial court, after hearing the affidavits, overruled the motion for a new trial, it will not be held that the juror possessed such bias or prejudice as precluded him from giving defendant a fair trial, there being doubt as to whether the remark was made at all, and doubt if made whether it referred to the defendant or pertained to a general but commendable detestation of crime, and in such case the rule is that the doubt should be resolved in favor of the ruling of the trial court. *Ib.*
4. **Friendliness to Defendant's President.** A juror who states on his *voir dire* that he has known defendant's president for thirty-five years and that their relations are very friendly, but states that such friendship will not influence his verdict, and that he will be guided by the evidence and the instructions of the court, is not incompetent. *Tawney v. United Rys. Co.*, 602.

JURISDICTION.

Condemnation: Cities of Third Class: Notice: Appeal. Where in a proceeding by a city of the third class to condemn land to widen a street the owner was served with summons, filed answer, and contested to judgment, the proceeding as to him will not be

JURISDICTION—Continued.

held invalid on his appeal because the record shows that the notice by publication to those owning land within the benefit district was defective. *Springfield v. Owen*, 92.

JUSTICE OF PEACE COURT. . See Practice.

LANDS AND LAND TITLES.

1. **Will: Life Estate: Remainder: Construction.** A's will read, in part: "I hereby will and bequeath . . . to my daughters Dora, Annie, Maggie, and Amanda, severally, the sum of \$800 each, to be paid to them severally except to my said daughter Amanda; the share given her I bequeath to her sole and separate use, and I hereby constitute W her trustee" to lend or invest and manage her share for her, "paying over the interest thereon . . . for her support and maintenance, and any part of the principal if he shall deem it necessary, the balance remaining after the death of my said daughter to go to her surviving children share and share alike." Amanda's trustee invested her share in realty, taking title in himself as trustee, and put her in possession. She deeded a half interest in the land to her daughter Georgia, and by will devised a half interest in the remainder to the same daughter, her other children to have what was left. *Held*, that under A's will Amanda took a life estate only, with remainder to her surviving children, and therefore neither her deed nor her will was effectual to pass title. *Freeman v. Maxwell*, 13.
2. ———: ———: ———: **Separate Estate: Land Purchased by Trustee.** The fact that the trustee of a fund given by will to a woman for her sole and separate use for life, remainder to her surviving children, when he invested the fund in realty and put her in possession took the title in himself as her trustee with no provision for the remainder to her children, does not defeat the remainder. *Ib*.
3. ———: ———: ———: ———: ———: **Trustee's Power of Disposing of Principal.** A's will bequeathed a fund in trust for his daughter's sole and separate use, remainder to her surviving children, the trustee to pay over the interest, and any part of the principal if he should deem it necessary, for her support. The trustee invested the fund in realty and put the daughter in possession, taking the title in himself as trustee with no provision as to the remainder. *Held*, that since there is nothing in the record to indicate that it ever became necessary to use any of the principal for the *cestui's* support, it cannot be presumed that the trustee in buying the land and taking the title as he did intended to exercise his power of paying her the principal and thought thereby to vest her with the fee in the land. *Ib*.
4. **Contracts: Cancellation: Specific Performance: Fraud: Mutuality.** A widow and two children, Sarah and Noel, survived John F. Gilbirds, who died intestate seized of the legal title to 840 acres of land heavily encumbered. Sarah sued to enforce an alleged oral agreement to partition, and appealed to the Supreme Court from a decree vesting the title to all the land in the widow, her mother. The widow thereafter executed a deed to a trustee, which empowered him to manage the property, or if need be sell any part of it, for the purpose of paying off the incumbrances, together with debts of the grantor amounting to over \$1800, the remainder to go to

LANDS AND LAND TITLES—Continued.

her for life and then in fee to her son and his wife. At about the same time she contracted to sell a portion of the land, and when she found she could not perfect title on account of Sarah's pending appeal in the partition suit, she entered into a contract with Sarah and her husband, dated April 28, 1909, by which it was agreed that the trustee should convey to the widow for life, with remainder in Sarah; that Sarah should dismiss her appeal in the partition suit; that the proceeds of a sale of 334 acres, for which all parties agreed to make deeds, should go to pay the widow's debts and reduce the incumbrances; that the widow should, for her life, lease the remainder to Sarah and her husband for \$300 a year, the lessees to pay all taxes and insurance; and that the lessees should have the right to sell, "as soon as practicable and on the best terms obtainable," all or any portion of the premises to further reduce the incumbrances, the widow agreeing to join in all deeds necessary to carry out any such contract of sale. Sarah's appeal was dismissed and the provisions of the contract were carried out, until Sarah's husband, in July, 1910, made a contract, which Sarah afterwards ratified, for the sale of sixty-four acres of the remaining land, whereupon the widow refused to join in a deed. To a suit for specific performance brought by Sarah, her husband and the contracting purchaser, the widow answered asking that the contract of April, 1909, be cancelled as unconscionable, not supported by valid consideration, and procured by false representations. She testified that, to induce her to sign, her daughter told her the \$300 a year rent was a mere form—that she should never want. The evidence shows that the income from the premises was only about \$865 a year, which left very little in the hands of Sarah and her husband after they made the payments specified in the contract of 1909.

Held, that, in view of all the facts, the trial court's refusal to cancel the contract of 1909 must be upheld, especially since there is no showing in the record that Sarah's appeal in the partition suit was other than meritorious, or that she refused or failed to carry out her promise to provide additional support for her mother.

Held, also that, since the contract of 1910, which must be considered together with that of 1909, definitely fixed the price and described the land; was mutual as regards the widow and the purchaser; was a sale "as soon as practicable and on the best terms obtainable," and was ratified by Sarah, the trial court was right in decreeing that the widow should perform specifically by joining in a deed to the purchaser. *Forgey v. Gilbirds*, 44.

5. **Specific Performance: Undisclosed Principal.** Specific performance may be enforced either by or against an undisclosed principal when his duly authorized agent, in his own name, within the scope of the agency, has contracted concerning the sale or purchase of the principal's land. *Ib.*
6. **Will: Power of Disposition: Limitation Over.** Where a life estate is expressly or impliedly created by will or deed, with which is coupled a power of disposition by the life tenant and a remainder in fee to others, the limitation over will take full effect upon the death of the life tenant, unless the power of disposition has been exercised by her in strict accordance with the terms in which it was bestowed. So much of the property as the life tenant has not attempted to dispose of,

LANDS AND LAND TITLES—Continued.

upon her death vests in fee in the remaindermen named. *Priest v. McFarland*, 229.

7. ———: ———: **Reservation of Life Estate.** The testator devised all his property to his wife, "to be held, owned and enjoyed by her during her natural life with full power to sell and dispose of the same or any part thereof absolutely and at her own discretion and with full power to give a good and perfect title upon sale or other disposition of any or all of my said property" and further provided that "at the death of my said wife whatever of my property or its proceeds may remain undisposed of by my said wife, shall descend to and be divided between my said children." The wife conveyed the land in suit to two of said children for an expressed consideration of \$6000, reserving to herself a life estate, and providing that the fee should vest in them at her death. They went into possession and accounted to her for rent until her death. *Held*, by a majority of the judges, that the deed should be upheld; that the life tenant could dispose of the fee, and reserve to herself a life estate in the property; though a majority do not agree that she had power to give away the property, but there being evidence that the consideration named was actually paid a majority hold that the judgment of the trial chancellor should be affirmed. *Ib.*
8. ———: ———: **Testamentary Deed.** A deed which expressly reserves a life estate in the grantor, and conveys at the same time, by words of present import, a vested remainder in the property to the grantees, is not a mere attempt to convey the title by an instrument in the nature of a last will and testament, but is in legal effect a present conveyance of a fixed right, namely, a vested title in fee. *Ib.*
9. **Implied Easement: Obstruction: Injunction.** For the reason stated in *Bussmeyer v. Jablonsky*, 241 Mo. 681, the judgment in this case in which plaintiff wishes to enforce an implied easement conferred upon one piece of property by the owner of the adjoining piece, and to enjoin the defendants from obstructing the entrance to a three-foot passageway upon a lot owned by defendants, is reversed, the facts and issues being the same. *Jablonsky v. Wussler*, 320.
10. **Probate of Will: Not Entered of Record: Order Made After Many Years: Evidence.** The Revised Statutes of 1865 provided that the clerk of the county court should take the proof of wills in vacation, subject to confirmation or rejection by the court, and that, when any will was exhibited, the clerk might receive the proof and grant a certificate of probate or of rejection. In 1865 a will was presented, and the proof of the subscribing witnesses was written, signed, and certified upon the will itself, which was then filed but not recorded. The court, when it met in term, made an order appointing an administrator *c. t. a.* This suit to quiet title having arisen long afterward, involving the provisions of the will, it was held on a former appeal that the proof did not justify the conclusion that the will had been probated. Accordingly the probate court, in 1912, ratified the proceedings of the county clerk, adjudged the instrument proved and ordered it admitted of record. The order and judgment were copied upon the will and signed by the judge. *Held*, that the instrument was thereafter, in the retrial of the suit to quiet title, properly received

LANDS AND LAND TITLES—Continued.

in evidence as the last will and testament of its signer, and that under it the plaintiffs are entitled to their interests as remaindermen. *Farris v. Burchard*, 334.

11. **Limitations: Dower: Thirty-Year Statute.** A widow who claims dower in land which belonged to her husband during his life-time cannot recover in an action for the admeasurement of dower, if the land has been in the lawful possession of those who bought at a foreclosure sale under a deed of trust signed by her and her husband and of those who claim under them, for thirty-one consecutive years before her suit was instituted, and during all that time neither she nor any one for her has paid any taxes, and if the title emanated from the government more than ten years before the entry by lawful possession of any person holding the premises. *Jodd v. Mehrstens*, 391.
12. **Specific Performance: Defective Title.** Where the agreement for the exchange of lands was that each party should furnish an abstract of title to the property to be conveyed by him, showing a good title in him, and if the abstract failed to show a good title in him then he should make such corrections as might be necessary to perfect it, plaintiff cannot have a decree for specific performance unless he has a good title. *Munyon v. Hartman*, 449.
13. ———: ———: **Admission of Defects.** The institution of a suit in the circuit court and at the same term, by plaintiff, to quiet title to a part of the land for which he seeks a decree of specific performance of a contract to convey to him, is a solemn admission of record that he does not own a good title to the entire tract, and is a bar to his right to a decree for specific performance, where the contract to convey calls for a good title. *Ib.*
14. **Forcible Entry and Detainer.** The rule that in actions of forcible entry and detainer title is not an issue, is to be taken in the sense that title is not tried out as a determinative factor. It does not mean that title is not to be considered for any purpose. *Hafner Mfg. Co. v. St. Louis*, 621.
15. ———: **Circumstances: Judgment in Ejectment.** In forcible entry and detainer, the question of lawful possession and unlawful ouster, and not the title to the land, is the matter for adjudication; but what constitutes possession must depend upon circumstances. The records in an ejectment suit, brought by plaintiff's ancestor against the city, in which it was held that a certain tract of land, of which that in suit is a part, was a public wharf belonging to the city, though said part has never been reduced to actual wharf uses, may be offered in evidence for the purpose of showing the character of possession of the plaintiff in the land in suit, since the purposes for which it has been used has an influence in arriving at common-sense conclusions as to whether or not plaintiff has been in possession. If the judgment record in the ejectment suit is not used as a basis for a finding in the unlawful detainer suit, that is, the case is not made to turn on title, the evidence can do no harm. *Ib.*
16. **Partition: Conveyance in Tail: Life Tenant Living: Contingent Remainders.** Under Sec. 2872, R. S. 1909, providing that one who by the laws of England would have become seized

LANDS AND LAND TITLES—Continued.

in fee tail of lands, shall be deemed to be seized for his life only, the remainder to pass in fee to those to whom the estate would have first passed by the common law at his death, and Sec. 2874, which provides that the remaindermen shall take as purchasers, the grantee in a deed reading to her and her "body heirs" cannot, without statutory authority, have the land sold for partition between her and her children and thus destroy the reversion. *Stockwell v. Stockwell*, 671.

17. ———: ———: ———: ———: Sec. 2559, R. S. 1909, Sec. 2659, R. S. 1909, providing that if in any case, from the joint tenancy, tenancy in common, or coparcenary, including estates in fee, for life, or for years, tenancy by the curtesy and in dower, any of the parties interested may maintain a suit for partition, affords no authority to a grantee in a deed to her and her bodily heirs to maintain partition between her and her children. *Ib.*
18. ———: ———: ———: ———: Sec. 2612, R. S. 1909, Sec. 2612, R. S. 1909, providing that if in any case, from the nature and amount of the property to be divided, and the number of the owners, partition in kind cannot be made without great prejudice to the owners, an order of sale may be made without the appointment of commissioners, leaves to Sec. 2559 the designation of the title necessary to maintain the proceeding, and gives a contingent remainderman no right to a sale for partition. *Ib.*
19. ———: ———: ———: ———: **Representation of Expectancies.** The fact that the law allows partition of joint tenancies and tenancies in common, each possessory holder being regarded as the representative in the partition proceedings of the owners of expectant estates, whether vested or contingent, limited upon his interest, affords no authority for partition, while the first taker lives, by the joint tenants of a contingent remainder under a conveyance in tail, especially where the owner of the reversion is not joined. *Ib.*
20. ———: **Title of Street: Admitted in Return.** The title to public streets is necessarily in the city; and if defendant in its return to the writ of mandamus, commanding it to construct a viaduct over its tracts at a certain street crossing, admits that the street was at all times a public street, it will not be heard to contend that the title to the street is in it. *State ex rel. v. Railroad*, 720.

LARCENY.

1. **Instructions: Stealing Chickens: Definition of Grand Larceny.** An instruction defining grand larceny which omits the fact that the chickens must have been taken in the nighttime to have constituted grand larceny, is immaterial and harmless, if the words "grand larceny" do not appear in any other instruction, and the jury were not required to find the defendant guilty of grand larceny, and the only issue under the evidence was whether defendant stole the chickens, and that issue was presented in a proper instruction. *State v. Walls*, 105.
2. **Conviction: On Evidence of Accomplice.** A defendant may be convicted of stealing chickens in the nighttime upon the testimony of an accomplice. *Ib.*

LARCENY—Continued.

3. **Instruction: No Felonious Intent: Steal.** An instruction setting forth the elements of larceny, which omits the words "with a felonious intent," or words of equivalent meaning, is erroneous. At common law a felonious intent was a constituent element of larceny, and by statute the common law is in force in this State and is the only rule of decision until it has been abrogated or changed by statute, and for at least ninety years the statute concerning larceny has contained the words "feloniously steal, take and carry away," etc. *State v. Rader*, 117.
4. ———: ———: **Words of Equivalent Meaning: Steal.** Larceny is an exception to the general rule, which is that the words "felonious" and "feloniously" need not be used in an instruction, and if used they need not be defined. An instruction for grand larceny ought to require the trial jury to find that the taking was with a felonious intent, out the specific use of the word "felonious" or "feloniously" is not absolutely necessary. Words of equivalent meaning may be used instead; but the word "steal" is not an equivalent. *Held*, by WALKER, J., that where the instruction contains the words "unlawfully steal, take and carry away" the words "with felonious intent" are not only not necessary, but their use would be both redundant and tautological. *Ib.*
5. ———: ———: **Accessory.** Defendant, while confined in calaboose for a misdemeanor, hired Bell to feed and attend to his horses kept in a barn. The feed running short, defendant directed Bell to go to a neighbor's barn and get corn and alfalfa. Bell did so, committing grand larceny, and concealed the articles in defendant's barn. Bell at first denied that defendant was connected with the larceny, but later confessed, and testified he stole the corn and alfalfa at defendant's direction and procurement; defendant testified that he directed Bell to buy the feed, not to steal it. The case is close upon its facts. *Held*, that defendant was entitled to a specific instruction requiring the jury to find that defendant, in the alleged procurement of said Bell to commit the larceny charged, acted with a felonious intent. An accessory before the fact must in all cases act with a criminal intent, and where the crime charged is grand larceny he must have acted with a felonious intent. *Ib.*
6. **Instructions: Assumption of Larceny: Accessory.** Where defendant is being tried as an accessory to a grand larceny committed by Bell, and Bell swears he did steal the things charged, and defendant does not deny or controvert the theft, but denies his guilty connection therewith, it is not error for the State's instructions to assume that Bell stole the things. *Ib.*
7. **Recovery on Grounds Not Pleaded: Fraud.** Where the petition charged that defendants obtained plaintiff's certificate of deposit for \$300 by fraud, conspiracy and procuring him to become drunk and a party to a gambling game, but did not impute to them the technical crime of larceny, an instruction, properly hypothesizing the conditions upon which he can recover actual damages, is error if it authorizes the jury to return a verdict for punitive damages if they believe the defendants had stolen the certificate. *Keller v. Summers*, 324.

LAWS.

Ordinance: Recital of Reasons for its Enactment: Viaduct Over Street. A legislative body need not recite the reasons which move it to enact a law. The law when enacted furnishes its own reasons. A railroad company cannot refuse to obey an ordinance requiring it at its own expense to construct a steel viaduct over its tracks at a street crossing for that the ordinance does not declare the existing grade crossing a public nuisance, or that it is dangerous, or states no reason for requiring a separation of grades at said crossing. State ex rel. v. Railroad, 720 .

LIMITATIONS.

1. **Streets.** Sec. 1886, R. S. 1909, providing that "nothing contained in any statute of limitation shall extend to any lands given, granted, sequestered or appropriated to any public . . . use," applies not simply to lands acquired by the public in fee, but to lands dedicated to a city for streets and alleys. Caruthersville v. Huffman, 367.
2. **Dower: Thirty-Year Statute.** A widow who claims dower in land which belonged to her husband during his lifetime cannot recover in an action for the admeasurement of dower, if the land has been in the lawful possession of those who bought at a foreclosure sale under a deed of trust signed by her and her husband and of those who claim under them, for thirty-one consecutive years before her suit was instituted, and during all that time neither she nor any one for her has paid any taxes, and if the title emanated from the government more than ten years before the entry by lawful possession of any person holding the premises. Jodd v. Mehrtens, 391.

LOCAL OPTION.

1. **Information: Allegation of Adoption in County.** An information, attempting to charge a violation of the Local Option Law, is not sufficient unless it charges both that the law has been adopted and is in force; nor would it be sufficient if it charged only that it had been adopted, for it may have been adopted and never put into force for lack of the necessary statutory notice. But if it charges that the law "was in full force and effect" in the county where the offense was committed, designating it by article and chapter, it charges that it had been adopted and was in force, for it could not well be in full force and effect unless it had been adopted. State ex rel. v. Robertson, 613.
2. ———: **Conflict in Opinions: Certiorari.** The last previous decision of the Supreme Court, and its previous rules as well, was to the effect that an indictment or information charging a violation of the Local Option Law must charge that the law had been adopted and was in force and effect in the county; and therefore a decision of the Court of Appeals holding that an information charging that the said law was at the time the offense was committed "in full force and effect in the county" was sufficient, was not in conflict with the last previous decision of the Supreme Court on the subject, but in harmony therewith, and its said decision will be upheld upon *certiorari*. *Id.*

MANDAMUS. See Viaduct.

MARRIED WOMAN. See Husband and Wife.

MASTER AND SERVANT

1. **Physician: Services Rendered at Request of Third Party.** Where a physician or surgeon renders services to one at the mere request of a third party on whom there rests no obligation to provide such service, the law will not imply a contract on the part of the person receiving the service to pay therefor. *Hunicke v. Quarry Co.*, 560.
2. **Negligence: Injury of Employee: Emergency: Duty of Master to Procure Medical Treatment.** When an employee is engaged in a dangerous work for the master and, while in the performance of his duties, is so badly injured that he is thereby rendered physically or mentally incapable of procuring medical assistance for himself, the duty is devolved upon the master, as a matter of law, to procure such assistance for him, with reasonable diligence and in a reasonable manner, through the agency of such of his employees as may be present at the time; and a violation of that duty is negligence, for which the master must respond in damages, if there is evidence tending to show that the negligence was the proximate cause of the injured employee's death. *Ib.*
3. ———: ———: ———: ———: **Diligence: Question for Jury.** Deceased, a young man twenty-three years of age, was in the employ of defendant at its stone quarry about two miles from a railroad station, and thirteen miles from a city station, near which was a hospital. From the main line of the railroad to the stone quarry was a railway track maintained by the quarry company, and as a coal car was being transported over said track, the young man was struck by a moving car, the bone of his leg, six or seven inches below the hip joint, was badly broken and crushed, a large hole torn in the flesh, and the skin, veins and arteries lacerated, followed by a profuse flow of blood. The superintendent by telephone called upon a physician at the railroad station to come quickly, who replied that it was impossible for him to leave a dying patient, and directed that the injured man be placed upon a hand car and brought to the station, and promised if that were done he would treat him there; and an hour later the call and reply were repeated. No reason was given why the physician's directions were not obeyed except the track was rough and the jolting would have increased the flow of blood. There were other physicians in near-by towns, but none of them were called. There were also automobiles at hand and in the city, but none of them were called into use to take the man to the city, and the excuse given was that the roads were rough and the jolting would increase the flow of blood. The superintendent telephoned to the general offices of the quarry company in the city, and was instructed to bring the man to the city on a passenger train, which was due to arrive at the station three hours after the accident, but arrived one hour behind schedule. It was suggested to the superintendent that a rope be tied around the man's leg above the injury, but he said it would do no good. The blood continued to flow, and the man was removed to the company's office, where a sheet was placed over and under the injured parts, and four hours after the accident he was placed upon the hour-late passenger train and taken to the city, where he was met by automobile, surgeons and nurses and taken to a near-by hospital, and the leg bandaged. At the time he was practically without blood, though still rational. An amputation was at once performed, but in a few hours he died. *Held*, that the evidence tended to show that the quarry company was guilty of negligence in not

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using more diligence to procure medical and surgical treatment for the young man, and also to show that said negligence was the proximate cause of his death, and whether or not such negligence existed was a question for the jury. *Ib.*

4. ———: ———: ———: ———: **Basis for Rule.** Where a servant, in performing dangerous work for his master, is so badly injured as to be incapacitated to care for himself, the duty of providing medical treatment is devolved upon the master; and the rule is based upon the unexpressed humane and natural understanding existing between civilized men that wherever any one is so injured that he cannot care for himself then those who stand by and have directly or indirectly contributed to his injury owe him the duty of trying, while the emergency lasts, to alleviate his suffering or save his life, and that rule is but the application or extension of the common-law rule which requires the master to furnish his servant with a safe place in which to work and safe instrumentalities with which to perform his labor. *Ib.*
5. ———: ———: ———: **Proximate Cause of Injury: Instruction.** In a suit for damages for negligent failure by an employer to furnish a dangerously injured employee prompt medical assistance, an instruction should not tell the jury that if they are unable to determine whether the deceased would have died from the injury received, even though proper medical assistance had been promptly furnished him; then they should find for the defendant. Such an instruction raises a purely metaphysical speculation, since no man can answer it with certainty. The law is that as soon as the dangerous injury occurred, while the employee was in the discharge of his work for the master, it became the master's duty, in the emergency, to use diligence to provide medical treatment for him, and if the evidence shows his negligent failure to employ reasonable efforts to do so in all reasonable probability was the proximate cause of the employee's death, the master is liable. On the other hand, the court should instruct the jury for defendant that if they believe from the evidence that the injury was the direct and proximate cause of his death, the master is not liable. *Ib.*
6. **"Operating Railroad:" Fellow-Servant Act: Car Repairer.** A car repairer while working at his task in the repair yards of a railroad company is "engaged in the work of operating such railroad" within Sec. 5434, R. S. 1909, and is entitled to damages from the company for injuries caused by the negligence of a fellow-servant. *Powers v. Railroad, 701.*

MEDICAL ATTENDANCE, DUTY OF MASTER. See **Master and Servant.**

MERCANTILE AGENT.

Interstate Commerce. A mercantile agent who, as the agent of a foreign corporation, goes from house to house and obtains orders from residents for coffees, teas and groceries, and sends them to his principal in another State, which fills them by making up separate packages for each order, and sends them to said mercantile agent, who delivers them in the unbroken package to the persons who have ordered them

MERCANTILE AGENT—Continued.

and receives the money therefor, which he transmits to his principal, is engaged in interstate commerce; and an ordinance which seeks to punish him for engaging in such business without a license, is unenforceable as to him or others engaged in a like business. [Following *Jewel Tea Company v. Carthage*, 257 Mo. 383.] *Fleming v. Mexico*, 432.

MISCONDUCT OF PROSECUTING ATTORNEY. See Attorneys, 1.**MISJOINDER.**

1. **Several Causes.** The statute (Sec. 1795, R. S. 1909) provides that several causes of action may be united in the same petition, whether they be legal or equitable or both, where they arise out of the same transaction or transactions connected with the same subject of action, but the causes so united must all belong to one of the classes mentioned in the statute, and "must affect all the parties to the action." *Trefny v. Eichenseer*, 436.
2. ———: **Different Counts: One Against All: The Other Against Some.** Where there are two counts joined in a petition, the petition is demurrable unless each count affects all the parties to the action. Where the first count of a petition is a bill in equity seeking relief against five defendants in clearing title to real estate and preventing threatened execution sales calculated to wrongfully cloud the title, charging a conspiracy among them designed and intended to depress the value of plaintiff's property, and to extort money from him, and asking for a trial before the chancellor, and the second count, confessedly arising out of the same transaction, asks for damages against three of the same defendants for acts done in furtherance of a malicious conspiracy to injure plaintiff, and demands a trial by jury after plaintiff's equitable relief prayed for in the first count has been granted, the petition is demurrable, in that it is violative of the statute which declares that different causes of action united in the same petition "must affect all the parties to the action." *Ib.*

MORTGAGES AND DEEDS OF TRUST.

1. **Trustee's Sale: Mistake as to Time: Set Aside.** A mistake as to the time of sale of land advertised for sale under a deed of trust, coupled with great inadequacy of price and an offer of the beneficiary to pay all the costs of the sale made before he arrived on the ground, is a sufficient basis for setting aside the sale and ordering another sale. *Middleton v. Baker*, 398.
2. ———: ———: ———: **Offer to Pay Costs.** Where the property was duly advertised for sale between nine and five o'clock, and was sold on the day mentioned at two o'clock, in the absence of the beneficiary in the deed of trust, who was mistaken as to the hour of sale and did not arrive until a few moments after the property had been sold by the sheriff as substituted trustee, at less than four per cent of its value and at about eight per cent of the debt, and where upon his arrival he requested the sheriff to resell the property and offered to pay all the costs then accrued and to guarantee that the property, if resold, would bring a fair market price, the sale should be set aside on the grounds of common justice. *Ib.*

MOTION FOR NEW TRIAL.

1. **No Instruction: Not Raised by Motion.** If it be an error of the trial court to fail to instruct the jury that the fact, if it were a fact, that defendant was under eighteen years of age when convicted precludes the jury from considering his said former conviction in another State in assessing his punishment, it was an error of omission to instruct, and in order to be available to defendant on appeal his motion for a new trial should contain a specific assignment that the trial court failed to instruct on the point. *State v. Levy*, 181.
2. **Newly Discovered Evidence.** To obtain a new trial on the ground of newly discovered evidence the party asking for it must show; first, that the evidence has come to his knowledge since the trial; second, that it was not owing to the lack of due diligence that it did not come sooner; third, that it is so material that it would probably produce a different result if the new trial were granted; fourth, that it is not merely cumulative; and, fifth, that the object of the evidence is not merely to impeach the character or credit of a witness. If the facts show that twenty-four hours before the close of the testimony, appellant was informed of the means by which to ascertain the names and residence of the absent witnesses and made no effort to obtain their attendance until after an adverse verdict was rendered, there was no diligence, and a new trial cannot be granted because of their absence. *Sang v. St. Louis*, 454.
3. **Appeal: Grounds Not Mentioned in Motion.** Constitutional objections to an ordinance set up in the answer, but omitted from defendant's motion for a new trial, will not be considered on appeal. *State ex rel. v. Railroad*, 720.

MOTION IN ARREST.

Erroneous Judgment. In order to raise the point on appeal that the judgment is erroneous in that it is not responsive to the issues, there must be a motion in arrest. *Howell v. Jackson County*, 403.

MOTION TO STRIKE OUT.

No Exception. In order that the action of the court sustaining defendant's motion to strike out a part of plaintiff's petition may be reviewed on appeal, it was necessary that an exception be saved to the ruling and be incorporated in a bill of exceptions. A motion to strike out a part of a pleading cannot be considered a demurrer, or a part of the record proper, and cannot be preserved for review as other record matters. *Carder v. Drainage District*, 542.

MULE ON PUBLIC STREET. See *Negligence*.

NATIONAL GUARD. See *Railroads*.

NEGLIGENCE.

1. **Recovery for Death: Law of Kansas: Liberally Construed.** Section 4871, General Statutes of Kansas 1901, providing for a recovery by the personal representatives for a wrongful killing, if the person killed might have maintained
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an action had he lived, is coeval with the State of Kansas, is remedial in character, and should receive a liberal interpretation. *Diariotti v. Railroad*, 1.

2. ———: ———: ———: **Notice.** Section 4871, General Statutes of Kansas 1901, provides that when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action had he lived. Section 1, chap. 393, Laws of Kansas 1903, provides that a railroad operating in that State shall be liable to any employee for all damages done to him through the negligence of its agents, engineers or other employees, provided that notice in writing of the injury shall have been given "by or on behalf of the person injured" within 90 days after the accident. *Held*, that the words concerning notice in Sec. 1, chap. 393, do not apply to an action under Sec. 4871, because notice can be given neither by the dead nor in their behalf, and the provision does not include notice given in behalf of one entitled to damages for the death of another. [*WOODSON, J.*, dissents.] *Ib.*
3. ———: ———: **Suit by Widow of Allen.** Under the laws of Kansas (Sec. 4872, G. S. 1901), an alien next of kin can maintain an action for damages for the wrongful killing of another alien, and where a widow, resident in Greece, filed her suit in Missouri, where her husband died as a result of injuries received in Kansas, an allegation in her petition that her husband died in Missouri is sufficient to show her capacity to sue until defendant shall plead and prove that deceased left an estate to be administered in Kansas. *Ib.*
4. ———: ———: **Question for Jury: Evidence: Reports to Defendant Introduced by Plaintiff.** Evidence in an action by a widow for damages for the death of her husband through the negligent managing of hand cars by defendant's employees *held* to justify a submission of the case to the jury despite the fact that, to show notice, plaintiff introduced reports of employees, made to the company in compliance with its rules, which tended to show due care on defendant's part and contributory negligence on part of deceased. *Ib.*
5. **Contributory: Assuming Place of Obvious Danger: Brakeman.** On defendant's line of railroad was an elevated platform, on which was a track, alongside of certain coal chutes, and next to them was a board wall six feet high. The distance from the track to this wall was thirty-seven inches, and the distance between the outer side of a car on this track and the wall was seven inches. There was no proof that the space between the track and the wall was ever used or intended to be used by brakemen to step into after coupling cars on the track. Deceased, an experienced brakeman, for three years in the employ of defendant, for three months a brakeman on the train, familiar with the platform and coal chutes and having frequently coupled cars on this track, was directed to assist the engineer, about nine o'clock at night, of July 5th, in taking two empty cars from the platform, and it was his duty to attend to coupling them to the other cars of the train. The cars were provided with automatic couplers, and when the engine backed up to the first car it coupled without difficulty; but the coupler failed to work on the second car,

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and the brakeman went over or through the cars and got down between them to open the coupler. Having done that, instead of climbing into the car and signaling the engineer from there to move the engine, he stepped out, between the track and the wall of the chute, and signaled the engineer with his lantern, and the engineer, responding thereto, moved the cars, with the result that the brakeman was caught in the narrow space between the side of the car and wall, his body crushed, and the injuries caused his immediate death. *Held*, that the danger was obvious and apparent, and deceased knowingly put himself in a place of peril, and under the circumstances he was guilty of such contributory negligence as bars a recovery by his administrator. *Smelser v. Railroad*, 25.

6. **Pleading: Next of Kin: Allegation of Damage.**

Held, by WALKER, J., that, in a suit by an administrator based on Sec. 5426, R. S. 1909, an allegation that "deceased was an unmarried man and left surviving him a father, mother, brothers and sister as his next of kin," is sufficient as to the existence of beneficiaries; but a petition which fails to contain any allegation of loss sustained by them by reason of his death, does not state a cause of action for substantial damages under the statute, and not even for nominal damages unless the proof shows his death was due to defendant's negligence. *Ib.*

7. **Contributory: Asleep Near Railroad Track: Train Violating Speed Ordinance.**

The defendant's railroad enters the city of Cape Girardeau 130 feet north of Sloan creek, and for about 800 feet north of the bridge over that creek the track is straight. A city ordinance puts the speed limit at five miles an hour within the city limits. At 1:30 a. m. the defendant's passenger train rounded the curve north of Sloan creek running forty miles an hour, and when about 700 feet north of the bridge the engineer saw the plaintiff's husband lying near the track. The engine struck and killed him while it was running, the engineer says, perhaps fifteen or eighteen miles an hour. The plaintiff's petition, in her suit for damages, contained two counts, the first based on the humanitarian doctrine, the second on a violation of the speed ordinance. The jury found for the defendant on the first count, and for the plaintiff on the second. The defendant alone appeals. *Held*, that the judgment must be reversed, the evidence showing contributory negligence on the part of deceased as a matter of law, in that he must have been asleep with his head almost upon the rail. [LAMM, C. J., and WALKER, J., dissenting.] *Hunt v. Railroad*, 271.

8. **Pleading in Justice Court.**

If a plaintiff elects to plead his cause of action brought in a justice of the peace court, he is bound by the allegations of his statement filed therein the same as he would be by the allegations of a petition filed in the circuit court. For instance, if he sues in tort, and specifically states the negligence on which he relies to recover, he must recover for that negligence and none other. *Lyman v. Dale*, 353.

9. **Allegation and Proof: Wild Mule.**

Where plaintiff charges that defendant was guilty of negligence in handling a "wild and unruly mule," which, as it was being led along a public street, ran into his buggy and broke down a wheel thereof,

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he cannot recover damages unless he proves that the mule was "wild and unruly."

Held, by LAMM, J., concurring, that, there being no evidence tending to show the mule was "wild and unruly," such a mule is not *per se* a nuisance, a vicious animal, so that when led by a halter, his owner must answer for damage done by his hind foot to the wheel of a passing buggy, or other acts. *Lyman v. Dale*, 353.

10. **Leading Mule Upon Public Street: Five-Foot ReIn.** The leading of a mule upon a public street, with a halter rein five or six feet long, is not negligence, unless some vicious propensity of the animal be pleaded and shown; and the court should so declare as a matter of law.

Held, by LAMM, J., concurring, that it is not negligence to ride one mule and lead another along a public street unless they are halter-yoked "neck and neck;" and especially in this case, because the injury to plaintiff's buggy was caused by the mule's hind leg getting into the wheel and there is no causal connection between the injury to the wheel caused by the hind leg and the failure to halter the mules neck and neck. *Ib.*

11. ———: ———: ———: **Expert Testimony.** Experts are not competent to testify that the proper way for handling mules being led along a public street is to halter them closely together. The matter is not one of expert exposition. *Ib.*

12. ———: ———: ———: ———: **No Objection.** Where the question is not one calling for opinion evidence the case is not changed on appeal by the fact that expert testimony was admitted without objection. *Ib.*

13. **Testimony: Credibility: Theory of Expert: Contradicted by Laymen.** The credit due the testimony of lay witnesses directed to establishing a fact, as against the advisory theorizing of experts, is always for the jury, not the court. It cannot be held that one of plaintiff's testicles was not driven by the accident up into his abdomen and remained there, simply because the doctors testified they never saw or read of an accident of the kind, and that the size of the usual canal, protected, as it is, by muscular rings, excludes the idea that the testicle could be driven by force from nature's sack up and along this canal, where unimpeached lay witnesses, including plaintiff's mother, testified that he was normal in this particular before the accident occurred and abnormal ever afterwards. The testimony of the experts was merely advisory, and the issue of fact was for the jury. *Sang v. St. Louis*, 454.

14. **Evidence: Future Medical Attention.** Future expenses for physicians rest upon the same ground as the probable loss of future earnings. Where the evidence shows that a hernia and a complicated, compound, comminuted fracture of the leg between the knee and the ankle, resulted from the accident; the medical testimony is that the hernia, though reduced, is likely to recur at any time, and the trouble, when once the abdominal walls are ruptured and the intestines protrude, will with reasonable certainty recur from lifting or even ordinary labor; that the bones of the leg had been somewhat crushed and this crushing made the fracture a comminuted one; that some flesh and ligaments got between the parts of the com-

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- pound fracture, and this was not discovered at first and caused suppuration and failure to knit, and after the bones were wired together it was several months healing, and at the trial, one year after the accident, there was still pain in the leg and tenderness in the wounded parts, there was sufficient evidence upon which to base an instruction authorizing a recovery "for any expense for medical services which the jury find and believe from the evidence plaintiff is reasonably certain to necessarily incur in the future by reason of his injuries and directly caused thereby;" for it is apparent from the evidence, that medical attention in the future will be reasonably certain to guard the situation or to reduce the recurring hernia or prevent strangulation. *Ib.*
15. ———: **Best Evidence.** No case calls for better evidence than the case admits of. Certain elements of damage may go to the jury though there is no line of testimony by which the fact of damage may be established with absolute certainty. *Ib.*
16. **Nominal Damages: Request for Limit to Must Be Made by Defendant.** If there is some substantial evidence that future medical services will be necessary, and defendant is of the opinion that it is not sufficient to support a finding of actual damages, it is its duty, if it wishes to limit plaintiff's recovery to nominal damages on that score, to ask an instruction to that effect. *Ib.*
17. **Damages: Modest Sum: Instruction: Elements Unsupported by Evidence.** Where the evidence establishes serious and permanent injuries and the verdict is for a modest sum and is absorbed by referring it to damages plainly suffered and about which there can be no speculation, it would be trifling with justice to suppose the jury allowed anything of substance on the issue of future medical services; and though the instruction permits a finding for future medical services, the verdict will not be reversed on the ground that the evidence fixes no definite amount or character of services to be rendered. *Ib.*
18. **Interstate Commerce: Empty Cars.** The hauling by an interstate railroad of a train of empty freight cars from a point in one State to a point in another State, is interstate commerce. The fact that the cars are empty does not make the shipment any the less interstate than it would be were they loaded either with articles of commerce or passengers. *Thompson v. Railroad*, 468.
19. ———: ———: **Killing Fireman: U. S. Employers' Liability Act: Widow as Only Plaintiff.** The right of a widow of a fireman for a train of empty cars being hauled by an interstate railroad from a point in one State to a point in another State, to recover for his negligent death, caused by a collision of his train with another, is dependent on the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act. Where said act is invoked and the shipment and road are interstate, the plaintiff's right to recover is regulated thereby, and not by the State Damage Act (Sec. 5425, R. S. 1909). *Ib.*
20. **Injury of Employee: Emergency: Duty of Master to Procure Medical Treatment.** When an employee is engaged in a dangerous work for the master and, while in the

NEGLIGENCE—Continued.

performance of his duties, is so badly injured that he is thereby rendered physically or mentally incapable of procuring medical assistance for himself, the duty is devolved upon the master, as a matter of law, to procure such assistance for him, with reasonable diligence and in a reasonable manner, through the agency of such of his employees as may be present at the time; and a violation of that duty is negligence, for which the master must respond in damages, if there is evidence tending to show that the negligence was the proximate cause of the injured employee's death. *Hunlike v. Quarry Co.*, 560.

21. ———: ———: ———: **Diligence: Question for Jury.** Deceased, a young man twenty-three years of age, was in the employ of defendant at its stone quarry about two miles from a railroad station, and thirteen miles from a city station, near which was a hospital. From the main line of the railroad to the stone quarry was a railway track maintained by the quarry company, and as a coal car was being transported over said track, the young man was struck by a moving car, the bone of his leg, six or seven inches below the hip joint, was badly broken and crushed, a large hole torn in the flesh, and the skin, veins and arteries lacerated, followed by a profuse flow of blood. The superintendent by telephone called upon a physician at the railroad station to come quickly, who replied that it was impossible for him to leave a dying patient, and directed that the injured man be placed upon a hand car and brought to the station, and promised if that were done he would treat him there; and an hour later the call and reply were repeated. No reason was given why the physician's directions were not obeyed except the track was rough and the jolting would have increased the flow of blood. There were other physicians in near-by towns, but none of them were called. There were also automobiles at hand and in the city, but none of them were called into use to take the man to the city, and the excuse given was that the roads were rough and the jolting would increase the flow of blood. The superintendent telephoned to the general offices of the quarry company in the city, and was instructed to bring the man to the city on a passenger train, which was due to arrive at the station three hours after the accident, but arrived one hour behind schedule. It was suggested to the superintendent that a rope be tied around the man's leg above the injury, but he said it would do no good. The blood continued to flow, and the man was removed to the company's office, where a sheet was placed over and under the injured parts, and four hours after the accident he was placed upon the hour-late passenger train and taken to the city, where he was met by automobile, surgeons and nurses and taken to a near-by hospital, and the leg bandaged. At the time he was practically without blood, though still rational. An amputation was at once performed, but in a few hours he died. *Held*, that the evidence tended to show that the quarry company was guilty of negligence in not using more diligence to procure medical and surgical treatment for the young man, and also to show that said negligence was the proximate cause of his death, and whether or not such negligence existed was a question for the jury. *Ib.*
22. ———: ———: ———: **Basis for Rule.** Where a servant, in performing dangerous work for his master, is so badly injured as to be incapacitated to care for himself, the duty of providing medical treatment is devolved upon the master; and the rule is based upon the unexpressed humane

NEGLIGENCE—Continued.

and natural understanding existing between civilized men that wherever anyone is so injured that he cannot care for himself then those who stand by and have directly or indirectly contributed to his injury owe him the duty of trying, while the emergency lasts, to alleviate his suffering or save his life, and that rule is but the application or extension of the common-law rule which requires the master to furnish his servant with a safe place in which to work and safe instrumentalities with which to perform his labor. *Ib.*

23. ———: ———: **Proximate Cause of Injury: Instruction.** In a suit for damages for negligent failure by an employer to furnish a dangerously injured employee prompt medical assistance, an instruction should not tell the jury that if they are unable to determine whether the deceased would have died from the injury received, even though proper medical assistance had been promptly furnished him, then they should find for the defendant. Such an instruction raises a purely metaphysical speculation, since no man can answer it with certainty. The law is that as soon as the dangerous injury occurred, while the employee was in the discharge of his work for the master, it became the master's duty, in the emergency, to use diligence to provide medical treatment for him, and if the evidence shows his negligent failure to employ reasonable efforts to do so in all reasonable probability was the proximate cause of the employee's death, the master is liable. On the other hand, the court should instruct the jury for defendant that if they believe from the evidence that the injury was the direct and proximate cause of his death, the master is not liable. *Ib.*
24. **Instruction: Legal Presumption of No Negligence: Modification.** An instruction for defendant stating to the jury the legal presumption that the injury or accident was not "due to any fault or want of care on the part of defendant," if it goes on to tell them to disregard the legal presumption if they believe the evidence introduced by plaintiff in support of her cause of action, but to find for defendant if they disbelieve it, or if they believe the weight of the evidence to be with defendant on the issue of negligence, or if the conflicting evidence simply creates an equilibrium of proof, is not erroneous. *Tawney v. United Railways, 602.*
25. ———: **Injured "In Any Other Way."** An instruction for defendant that tells the jury that plaintiff cannot recover if her husband was injured "in any other way" than as set forth in the allegations of specific negligence contained in the petition, is not error, even though there is evidence that he was injured by malarial fever, if other instructions require the jury in unmistakable terms to confine their attention to the specific injuries alleged. *Ib.*
26. ———: **Converse of Plaintiff's.** If plaintiff is given an instruction on the theory that if the street car started prematurely defendant was chargeable with his injury, defendant is entitled to one submitting the converse theory, namely, whether the car upon which plaintiff's husband desired to embark stopped a reasonable time to permit him to do so with safety, even though there is no testimony that he "waited an unreasonable time before attempting to board the car." *Ib.*
27. **Evidence: No Report of Injury.** It was not reversible error to permit defendant's claim-agent to testify that the custom and

NEGLIGENCE—Continued.

due course of business required a report of an accident or injury to a would-be passenger to be made by the street car conductor to defendant's managing officers for their information, and that no such report of the injury to plaintiff's husband was made. But the only relevancy of such testimony is to shed light upon the conduct of defendant in failing to take such steps as prudence would have suggested if it had been informed of the accident. *Tawney v. United Railways*, 602.

28. **Obstruction in Public Street: Knowledge.** Where a plaintiff, driving in a buggy, in broad daylight, along a public street, with actual knowledge of the existence of loose gas pipes and other temporary obstructions therein, is injured by the wheel of his buggy coming in contact therewith, he cannot recover for his resulting injuries, unless he exercised ordinary care to observe and avoid such obstructions. The rule that in driving along a public highway he had the right to assume (without looking) that said highway was free from obstructions, has no application where he had actual knowledge of such obstructions. Such actual knowledge required him to keep a diligent lookout for them. *Welch v. McGowan*, 709.
29. ———: ———: **Protruding Gas Pipe: Failure to Look: Contributory Negligence.** And though the defendants were negligent in permitting the end of a large gas pipe to protrude into that part of the street left open to public travel, that did not relieve the driver of a buggy along the part left open from the duty of keeping a lookout for temporary obstructions after he observed that the street was torn up for the purpose of laying gas pipes; and if, with such knowledge, he did not look out for such protruding end, and fails to show that he could not have driven around it if he had looked and seen, his injury must be held to be the direct result of his own negligence. *Ib.*

NEW TRIAL.

Newly Discovered Evidence. To obtain a new trial on the ground of newly discovered evidence the party asking for it must show; first, that the evidence has come to his knowledge since the trial; second, that it was not owing to the lack of due diligence that it did not come sooner; third, that it is so material that it would probably produce a different result if the new trial were granted; fourth, that it is not merely cumulative; and, fifth, that the object of the evidence is not merely to impeach the character or credit of a witness. If the facts show that twenty-four hours before the close of the testimony, appellant was informed of the means by which to ascertain the names and residence of the absent witnesses and made no effort to obtain their attendance until after an adverse verdict was rendered, there was no diligence, and a new trial cannot be granted because of their absence. *Sang v. St. Louis*, 454.

NOMINEES OF POLITICAL PARTIES. See *Elections*.

NOTICE.

1. **Negligence: Recovery for Death.** Section 4871, General Statutes of Kansas 1901, provides that when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action

NOTICE—Continued.

had he lived. Section 1, chap. 393, Laws of Kansas 1903, provides that a railroad operating in that State shall be liable to any employee for all damages done to him through the negligence of its agents, engineers or other employees, provided that notice in writing of the injury shall have been given "by or on behalf of the person injured" within 90 days after the accident. *Held*, that the words concerning notice in Sec. 1, chap. 393, do not apply to an action under Sec. 4871, because notice can be given neither by the dead nor in their behalf, and the provision does not include notice given in behalf of one entitled to damages for the death of another. [WOODSON, J., dissents.] *Diariotti v. Railroad*, 1.

2. ———: ———: Question for Jury: Evidence: Reports to Defendant introduced by Plaintiff. Evidence in an action by a widow for damages for the death of her husband through the negligent managing of hand cars by defendant's employees *held* to justify a submission of the case to the jury despite the fact that, to show notice, plaintiff introduced reports of employees, made to the company in compliance with its rules, which tended to show due care on defendant's part and contributory negligence on that of deceased. *Ib*.

Also, see Parties to Action.

OBSTRUCTION OF PUBLIC STREET. See Negligence, 28 and 29.

PARTIES TO ACTION.

1. Negligence: Suit by Widow of Alien. Under the laws of Kansas (Sec. 4872, G. S. 1901), an alien next of kin can maintain an action for damages for the wrongful killing of another alien, and where a widow, resident in Greece, filed her suit in Missouri, where her husband died as a result of injuries received in Kansas, an allegation in her petition that her husband died in Missouri is sufficient to show her capacity to sue until defendant shall plead and prove that deceased left an estate to be administered in Kansas. *Diariotti v. Railroad*, 1.
2. Fraud: Suit to Recover Decedent's Personal Property: Cannot be Maintained by Heirs. The heirs of decedent, so long as his widow is administratrix, cannot maintain suit to recover the value of a stock of merchandise out of which he was fraudulently cheated by defendants—not even by joining the administratrix, on her refusal to sue, as a defendant. Such suit can only be maintained by the administratrix as plaintiff; and if she refuses to sue, the remedy of the heirs is to sue on her bond, or to bring proceedings in the probate court to have her removed as administratrix and another appointed in her stead. *Toler v. Judd*, 844.
3. Widow as Sole Plaintiff: Killing Fireman: U. S. Employers' Liability Act. The right of a widow of a fireman for a train of empty cars being hauled by an interstate railroad from a point in one State to a point in another State, to recover for his negligent death, caused by a collision of his train with another, is dependent on the Act of Congress of April 22, 1908, known as the Federal Employers' Liability Act. Where said act is invoked and the shipment and road are interstate, the plaintiff's right to recover is regulated thereby, and not by the State Damage Act (Sec. 5425, R. S. 1909). *Thompson v. Railroad*, 468.

PARTITION.

1. **Conveyance in Tail: Life Tenant Living: Contingent Remainders.** Under Sec. 2872, R. S. 1909, providing that one who by the laws of England would have become seized in fee tail of lands, shall be deemed to be seized for his life only, the remainder to pass in fee to those to whom the estate would have first passed by the common law at his death, and Sec. 2874, which provides that the remaindermen shall take as purchasers, the grantee in a deed reading to her and her "body heirs" cannot, without statutory authority, have the land sold for partition between her and her children and thus destroy the reversion. *Stockwell v. Stockwell*, 671.
2. ———: ———: ———: **Sec. 2559, R. S. 1909.** Sec. 2559, R. S. 1909, providing that where lands are held in joint tenancy, tenancy in common, or coparcenary, including estates in fee, for life, or for years, tenancy by the curtesy and in dower, any of the parties interested may maintain a suit for partition, affords no authority to a grantee in a deed to her and her bodily heirs to maintain partition between her and her children. *Ib.*
3. ———: ———: ———: **Sec. 2612, R. S. 1909.** Sec. 2612, R. S. 1909, providing that if in any case, from the nature and amount of the property to be divided, and the number of the owners, partition in kind cannot be made without great prejudice to the owners, an order of sale may be made without the appointment of commissioners, leaves to Sec. 2559 the designation of the title necessary to maintain the proceeding, and gives a contingent remainderman no right to a sale for partition. *Ib.*
4. ———: ———: ———: **Representation of Expectancies.** The fact that the law allows partition of joint tenancies and tenancies in common, each possessory holder being regarded as the representative in the partition proceedings of the owners of expectant estates, whether vested or contingent, limited upon his interest, affords no authority for partition, while the first taker lives, by the joint tenants of a contingent remainder under a conveyance in tail, especially where the owner of the reversion is not joined. *Ib.*

PARTNERSHIPS.

1. **Corporations: Formation: Partnership Relation Between Organizers: Must be Established by Proof.** Promoters of a corporation are not prima-facie partners. The partnership must be established by proof. *Ringolsky v. Mining Co.*, 241.
2. ———: ———: ———: ———: **Evidence.** Where R, T, and G, with others, formed a corporation, each putting in mining property and taking in return stock and bonds of the corporation, evidence *held* not to show that R and T were partners. *Ib.*
3. ———: ———: ———: **Promoters: Secret Profits.** T, G, and G's associates owned four mines. In May, 1905, the plaintiff and M I bought an interest in two of the mines, and on July 9, 1905, G offered to sell his interest and that of his associates to the plaintiff and T for \$257,000. They agreed to buy, and a week later the plaintiff, with T and M I, drew up a contract providing for the formation of a corporation to take over the mines, M I to advance \$50,000 and to hold stock as security

PARTNERSHIPS—Continued.

until G was fully paid, the plaintiff and T to transfer to the corporation all their interest in the mines. T was to receive one-half, and the plaintiff and M I each one-fourth of the issued stock. In August, 1905, the plaintiff, G, and M I, with M I's associates, Bendet Isaacs, Adolph Eliasberg and the two Rosenwassers, entered into an agreement to form the corporation with a capital stock of 2,500,000 shares, par value \$1 each. M I, the Rosenwassers, and Eliasberg were to pay G an additional \$50,000, and for the \$100,000 total thus paid they were to receive \$1,000,000 in bonds and 500,000 shares of stock in the new corporation. Bendet Isaacs was to pay \$33,333.33 into the treasury and receive the same amount in bonds and 166,666 shares of stock, the stock to be taken out of the holdings of the plaintiff and T. For the additional \$157,000 due him G agreed to take \$100,000 in bonds, a vendor's lien for \$57,000 and 100,000 shares of stock, the bonds to be the first paid by the company and the earnings to be applied to paying off the vendor's lien. T did not sign this agreement, and when in September, 1905, he made several objections to its consummation in that form certain concessions were made to him, and finally G told him he believed the stock he (T) would get would be worth as much as his (G's) bonds, and agreed to let him, at any time he might wish, take a part of the bonds, in exchange for a proportionate share of T's stock. With this understanding between them, undisclosed to the others, the agreement was closed substantially on the contract basis. Afterwards there was drawn and signed a declaration of trust, wherein it was declared that G and T jointly owned the stock and bonds acquired by each. Later both G and T disposed of all their stock and bonds to another corporation. *Held*, in plaintiff's suit for secret profits alleged to have accrued to T by reason of his undisclosed agreement with G, that there can be no recovery, even assuming that T was a promoter and that the plaintiff has the right to sue on behalf of the company after parting with his stock. *Ib.*

PARTY COMMITTEES AND CANDIDATES. See **Elections.**

PASSENGER RATES. See **Railroads.**

PERSONAL PROPERTY.

Fraud: Suit to Recover Decedent's Personal Property: Cannot be Maintained by Heirs. The heirs of decedent, so long as his widow is administratrix, cannot maintain suit to recover the value of a stock of merchandise out of which he was fraudulently cheated by defendants—not even by joining the administratrix, on her refusal to sue, as a defendant. Such suit can only be maintained by the administratrix as plaintiff; and if she refuses to sue, the remedy of the heirs is to sue on her bond, or to bring proceedings in the probate court to have her removed as administratrix and another appointed in her stead. *Toler v. Judd*, 344.

PHYSICIAN.

Services Rendered at Request of Third Party. Where a physician or surgeon renders services to one at the mere request of a third party on whom there rests no obligation to provide such service, the law will not imply a contract on the part of the person receiving the service to pay therefor. *Hunicke v. Quarry Co.*, 560.

PHYSICIAN AND PATIENT. See *Ravishment of Female.*

PLATS. See *Conveyances*, 2 to 4.

PLEADING.

1. Negligence: Next of Kin: Allegation of Damage.

Held, by WALKER, J., that, in a suit by an administrator based on Sec. 5426, R. S. 1909, an allegation that "deceased was an unmarried man and left surviving him a father, mother, brothers and sister as his next of kin," is sufficient as to the existence of beneficiaries; but a petition which fails to contain any allegation of loss sustained by them by reason of his death, does not state a cause of action for substantial damages under the statute, and not even for nominal damages unless the proof shows his death was due to defendant's negligence. *Smelser v. Railroad*, 25.

2. Prohibition: No Cause of Action Stated in Pending Suit. On prohibition the determinative question is not the sufficiency of the pleading in the trial court, where pleadings are amendable, but it is one of jurisdiction of the parties and subject-matter, or excess of jurisdiction; and if jurisdiction be present, and is kept within its proper channels, prohibition cannot go. *State ex rel. v. McQuillin*, 256.

3. Negligence: Pleading in Justice Court. If a plaintiff elects to plead his cause of action brought in a justice of the peace court, he is bound by the allegations of his statement filed therein the same as he would be by the allegations of a petition filed in the circuit court. For instance, if he sues in tort, and specifically states the negligence on which he relies to recover, he must recover for that negligence and none other. *Lyman v. Dale*, 353.

4. ———: Allegation and Proof: Wild Mule. Where plaintiff charges that defendant was guilty of negligence in handling a "wild and unruly mule," which, as it was being led along a public street, ran into his buggy and broke down a wheel thereof, he cannot recover damages unless he proves that the mule was "wild and unruly."

Held, by LAMM, J., concurring, that, there being no evidence tending to show the mule was "wild and unruly," such a mule is not *per se* a nuisance, a vicious animal, so that when led by a halter, his owner must answer for damage done by his hind foot to the wheel of a passing buggy, or other acts. *Ib.*

5. Amending Petition: Changing Cause of Action: Mistake in Description of Land. Where the original petition in ejectment described the northeast fractional quarter of a section 27, it is not error to permit the plaintiff to file an amended petition describing the land sued for as the northeast fractional quarter of section 28, and after a motion to strike out the amended petition, on the ground that it is the substitution of a new cause of action and not an amendment of the cause of action stated in the original petition, is overruled and defendant stands mute, to render judgment *nil dicti* for plaintiff on said amended petition for the land described therein. *Broyles v. Eversmeyer*, 384.

6. ———: ———: Statute Authorizing Correction of Mistake. Sec. 1848, R. S. 1909, declaring that the court, at any time

PLEADING—Continued.

before final judgment, in furtherance of justice, and on such terms as may be proper, may amend any pleading by correcting "a mistake in any other respect," authorizes the court to permit plaintiff in ejectment to file an amended petition changing the description of the land sued for; and a record entry showing that "leave is granted plaintiff to file an amended petition correcting error in description" is a finding by the court that a mistake was made in the description of the land in the original petition, and those things appearing it will not be held that the amended petition was the substitution of a new and different cause of action. *Ib.*

7. **Misjoinder: Several Causes.** The statute (Sec. 1795, R. S. 1909) provides that several causes of action may be united in the same petition, whether they be legal or equitable or both, where they arise out of the same transaction or transactions connected with the same subject of action, but the causes so united must all belong to one of the classes mentioned in the statute, and "must affect all the parties to the action." *Trefny v. Elchenseer*, 436.
8. ———: ———: **Different Counts: One Against All: The Other Against Some.** Where there are two counts joined in a petition, the petition is demurrable unless each count affects all the parties to the action. Where the first count of a petition is a bill in equity seeking relief against five defendants in clearing title to real estate and preventing threatened execution sales calculated to wrongfully cloud the title, charging a conspiracy among them designed and intended to depress the value of plaintiff's property, and to extort money from him, and asking for a trial before the chancellor, and the second count, confessedly arising out of the same transaction, asks for damages against three of the same defendants for acts done in furtherance of a malicious conspiracy to injure plaintiff, and demands a trial by jury after plaintiff's equitable relief prayed for in the first count has been granted, the petition is demurrable, in that it is violative of the statute which declares that different causes of action united in the same petition "must affect all the parties to the action." *Ib.*
9. **Unreasonable Ordinance: Must Be Pleaded.** When a defendant wishes to avoid the provisions of an ordinance on the ground that they are unreasonable, the particular facts which render them invalid should be pleaded. A general allegation that the "ordinance is unreasonable upon its face, is unjust and oppressive, and was passed without due consideration and without affording defendant an opportunity to be heard," is not sufficient to authorize a court to hold that an ordinance requiring defendant to construct at its own expense a steel viaduct over its tracks at a street crossing is unreasonable. *State ex rel. v. Railroad*, 720.

POLITICAL PARTIES. See Elections.

POSSESSION.

1. **What is Lawful Possession?** A complainant in a suit of forcible entry and detainer is bound to make proof that he was lawfully possessed of the premises and that defendant unlawfully entered into and detained the same; and "lawfully possessed" is used in the sense of "peaceable possession."

POSSESSION—Continued.

But peaceable possession does not mean possession obtained by force and a strong arm, or in tortious violation of the owner's right, nor does it mean a possession that is a mere sham. *Hafner Mfg. Co. v. St. Louis*, 621.

2. ———: **After Suit in Ejectment.** One cannot be said to be in lawful possession of land, after it has been adjudged by a suit in ejectment that his ancestor was not the owner, but that it was a part of a tract belonging to the city and dedicated to public use for wharf purposes, who piled lumber thereon, and then before the city undertook to remove obstructions therefrom and in contemplation thereof removed all his lumber except a few weather-stained boards and some stakes used in piling. *Ib.*
3. ———: **Unlawful Detainer: City.** It cannot be said that a municipal corporation, which, in the exercise of its charter and ordinance right to remove obstructions from public wharfs and streets, removes a few weather-stained plank and piling stakes from a part of a tract of land which has been adjudged by suit in ejectment to belong to it and has by it been dedicated to a public wharf, has thereby "unlawfully entered into and detained" said premises. *Ib.*
4. ———: ———: ———: **Wharf: Improvement.** Nor is the question of complainant's lawful possession or the city's unlawful entrance affected by the fact that the city had not improved so much of the public wharf as complainant claims, but had improved the balance. *Ib.*

PRACTICE.

1. **Suit to Probate Will: Action at Law.** An action in the circuit court to probate in solemn form a will which has been rejected by the probate court is but a will contest, and is an action at law, and the appellate court will not interfere with the verdict of the jury on the ground that the preponderance of the evidence was that there was no unsoundness of mind producing testamentary incapacity, where there was substantial evidence that testator was of unsound mind. *Heinbach v. Heinbach*, 69.
2. **Instructions Refused: Points Already Covered.** An appellant cannot complain because of the refusal of his instructions upon points covered by like instructions given by the court. *Springfield v. Owen*, 92.
3. **Objections to Evidence: Must Be Specific.** To avail upon appeal an objection to the introduction of evidence must be specific. The remark, "Question objected to," will not suffice. *Ib.*
4. **Appeal: Failure to Perfect.** From a conviction of burglary in the second degree and a former conviction of felony, defendant on April 1, 1913, was granted an appeal; on May 31, 1913, he secured an order of the trial court requiring the stenographer to furnish him a copy of the evidence as a poor person; on April 1, 1914, he filed his petition in the Supreme Court asking to be permitted to prosecute his appeal as a poor person, which motion was sustained on April 14, 1914, and on that day he filed a transcript of the record proper;

PRACTICE—Continued.

On August 14, 1914, he filed a second transcript, which embraces a copy of an order showing the filing of the bill of exceptions and also a copy of the bill; this second transcript recites that the bill of exceptions was filed by the clerk of the trial court on June 10, 1914, and that the clerk's certificate to said transcript is dated July 14, 1914. The Attorney-General, on October 15, 1914, moved the court to dismiss the appeal. *Held*, that defendant having omitted to state any reason why his second amended transcript covering the bill of exceptions was not lodged within the Supreme Court in a more expeditious manner, none of his exceptions and no part of the transcript except the record proper can be considered. *State v. Moulton*, 137.

5. ———: ———: **Filing Transcript.** When a defendant in a criminal case has not obtained the permission of the Supreme Court to prosecute his appeal as a poor person until the time has expired for perfecting his appeal, he should immediately, upon obtaining such permission, tender to the clerk his transcript of the entire record, or make a satisfactory showing why he is unable to do so. *Ib.*
6. **Robbery: Convicted of Larceny.** Under an indictment for robbery the accused may, in a proper case, be convicted of larceny. And where the trial court should have sustained defendant's instruction in the nature of a demurrer to the evidence, since it fails to show he was guilty of robbery, yet as it does show that he was guilty of larceny, he will not, on his appeal, be discharged, but the judgment will be reversed, and the cause remanded for further procedure according to the law and the facts. *State v. Parker*, 169.
7. **Misconduct of Prosecuting Attorney: Statement of Facts Unable to Prove: Cured by Instruction.** The misconduct of a prosecuting attorney will be weighed in connection with the facts of each case, and when the State's case is weak it will require less misconduct on the part of the prosecutor to work a reversal than where the evidence of defendant's guilt is strong. Where the assistant circuit attorney in his opening statement of the case against defendant charged with robbery, detailed to the jury certain alleged evidence of attempted bribery of the prosecuting witness, and after his failure to introduce such promised evidence, the court properly instructed the jury to disregard the statements pertaining to such attempted bribery, the evil effect of such unwarranted statement was thereby cured, the evidence of defendant's guilt being satisfactory. *State v. Levy*, 181.
8. **Negligence: Pleading in Justice Court.** If a plaintiff elects to plead his cause of action brought in a justice of the peace court, he is bound by the allegations of his statement filed therein the same as he would be by the allegations of a petition filed in the circuit court. For instance, if he sues in tort, and specifically states the negligence on which he relies to recover, he must recover for that negligence and none other. *Lyman v. Dale*, 353.
9. ———: **Allegation and Proof: Wild Mule.** Where plaintiff charges that defendant was guilty of negligence in handling a "wild and unruly mule," which, as it was being led along a public street, ran into his buggy and broke down a wheel thereof, he cannot recover damages unless he proves that the mule was "wild and unruly."

PRACTICE—Continued.

Held, by LAMM, J., concurring, that, there being no evidence tending to show the mule was "wild and unruly," such a mule is not *per se* a nuisance, a vicious animal, so that when led by a halter, his owner must answer for damage done by his hind foot to the wheel of a passing buggy, or other acts. *Lyman v. Dale*, 353.

10. **Nil Dicit Judgment: After Amended Petition Filed: Changing Cause of Action: Mistake in Description of Land.** Where the original petition in ejectment described the northeast fractional quarter of a section 27, it is not error to permit the plaintiff to file an amended petition describing the land sued for as the northeast fractional quarter of section 28, and after a motion to strike out the amended petition, on the ground that it is the substitution of a new cause of action and not an amendment of the cause of action stated in the original petition, is overruled and defendant stands mute, to render judgment *nil dicit* for plaintiff on said amended petition for the land described therein. *Broyles v. Eversmeyer*, 384.
11. **Motion in Arrest: Erroneous Judgment.** In order to raise the point on appeal that the judgment is erroneous in that it is not responsive to the issues, there must be a motion in arrest. *Howell v. Jackson County*, 403.
12. **Pleading: Proof: Surplusage.** Proof is required of those allegations only that are necessary to a recovery, and those unnecessary to that end may be eliminated as surplusage. *Wessel v. Lavender*, 421.
13. ———: ———: ———: **Action for Ravishing Unconscious Female: Cause of Unconscious State: Not an Issue: Instructions.** Where the petition in an action for damages for ravishment alleged that the defendant, a physician, administered medicine to the plaintiff while she was sick in bed, and she having become unconscious under the influence of the medicine, the defendant had sexual intercourse with her, the cause of the plaintiff's unconsciousness was not an issue, and the giving of an instruction requiring a finding that it resulted from the medicine was reversible error. *Ib.*
14. **Motion to Strike Out: No Exception.** In order that the action of the court sustaining defendant's motion to strike out a part of plaintiff's petition may be reviewed on appeal, it was necessary that an exception be saved to the ruling and be incorporated in a bill of exceptions. A motion to strike out a part of a pleading cannot be considered a demurrer, or a part of the record proper, and cannot be preserved for review as other record matters. *Carder v. Drainage District*, 542.
15. **Question for Jury: Injury to Employee: Duty of Master to Procure Physician: Diligence and Negligence.** Deceased, a young man twenty-three years of age, was in the employ of defendant at its stone quarry about two miles from a railroad station, and thirteen miles from a city station, near which was a hospital. From the main line of the railroad to the stone quarry was a railway track maintained by the quarry company, and as a coal car was being transported over said track, the young man was struck by a moving car, the bone of his leg, six or seven inches below the hip joint, was badly broken and crushed, a large hole torn in the flesh, and the

PRACTICE—Continued.

skin, veins and arteries lacerated, followed by a profuse flow of blood. The superintendent by telephone called upon a physician at the railroad station to come quickly, who replied that it was impossible for him to leave a dying patient, and directed that the injured man be placed upon a hand car and brought to the station, and promised if that were done he would treat him there; and an hour later the call and reply were repeated. No reason was given why the physician's directions were not obeyed except the track was rough and the jolting would have increased the flow of blood. There were other physicians in near-by towns, but none of them were called. There were also automobiles at hand and in the city, but none of them were called into use to take the man to the city, and the excuse given was that the roads were rough and the jostling would increase the flow of blood. The superintendent telephoned to the general officers of the quarry company in the city, and was instructed to bring the man to the city on a passenger train, which was due to arrive at the station three hours after the accident, but arrived one hour behind schedule. It was suggested to the superintendent that a rope be tied around the man's leg above the injury, but he said it would do no good. The blood continued to flow, and the man was removed to the company's office, where a sheet was placed over and under the injured parts, and four hours after the accident he was placed upon the hour-late passenger train and taken to the city, where he was met by automobile, surgeons and nurses and taken to a near-by hospital, and the leg bandaged. At the time he was practically without blood, though still rational. An amputation was at once performed, but in a few hours he died. *Held*, that the evidence tended to show that the quarry company was guilty of negligence in not using more diligence to procure medical and surgical treatment for the young man, and also to show that said negligence was the proximate cause of his death, and whether or not such negligence existed was a question for the jury. *Hunicke v. Quarry Co.*, 560.

16. **Certiorari: Conflict in Opinions.** *Certiorari* may be used to bring to the Supreme Court a case in which a Court of Appeals has rendered an opinion in conflict with the last previous decision of the Supreme Court, whether that last decision be right or wrong. *State ex rel. v. Robertson*, 613.
17. **Order of Proof: Discretion of Court: Embezzlement.** The order of testimony rests largely in the discretion of the trial court, and it is not error to admit in rebuttal testimony which might have been given in chief. *State v. Baker*, 689.

PRINCIPAL AND AGENT.

Specific Performance: Undisclosed Principal. Specific performance may be enforced either by or against an undisclosed principal when his duly authorized agent, in his own name, within the scope of the agency, has contracted concerning the sale or purchase of the principal's land. *Forgey v. Gilbirds*, 44.

PROFITS, SECRET. See *Corporations*, 1 to 3.

PROHIBITION.

1. **Motion for Judgment.** A motion by relators in prohibition, for judgment on the pleadings, filed after the coming in of the return, is a challenge, in legal effect, to the legal sufficiency of respondents' return. *State ex rel. v. McQuillin*, 256.
2. **When Writ Will Go.** A writ of prohibition will only go to keep an inferior court within the orbit of its jurisdiction. It is an extraordinary writ, and no recourse must be had to it except where ordinary remedies are unavailing. *Ib.*
3. ———: **How Lack of Jurisdiction May Appear.** Lack of jurisdiction may exist with reference to subject-matter generally (example, the class to which the case belongs) or with reference to the parties to the suit, or to excess of jurisdiction in the concrete case. *Ib.*
4. ———: **Discretion.** The mere power to grant a writ of prohibition is not of so much importance in determining whether or not it shall go as is the question of the discretion of the court which is asked to issue it. Such discretion is always to be reckoned with and steadily applied with judicial circumspection. *Ib.*
5. ———: ———: **Crowded Docket.** In the congested state of its docket, the Supreme Court will wisely exercise a sound discretion in refusing to draw to itself jurisdiction in the first instance on prohibition to determine the merits of controversies lodged in circuit courts, except on a clear showing of a lack of jurisdiction as a matter of law as distinguished from matter of fact, and that ordinary remedies by appeal, error or *certiorari* are absent. *Ib.*
6. ———: **Injunction.** The circuit court has jurisdiction of the subject-matter of issuing a temporary injunction to restrain a forcible and continuous trespass upon the property of a corporate lodge by the officers of the supreme organization and others, and the confiscation of its lodge furniture and money in bank, to be followed by a permanent one or by a dissolution thereof, on the application of equitable principles to the facts ascertained on final hearing, on answer or motion to dissolve; and having jurisdiction of the parties, the presence of those things is an insurmountable barrier to the issuance of a writ of prohibition before there has been any demurrer or answer, or motion to dissolve, unless, in some way, the court is proceeding in excess of that jurisdiction. *Ib.*
7. ———: ———: **Cause of Action.** The contention that the bill for injunction did not state facts sufficient to constitute a cause of action will not authorize prohibition, where the bill is either demurrable and no demurrer has been filed, or is subject to a motion to make more definite and certain and no such motion has been filed; for, in such cases, the Supreme Court is bound to assume that, if the trial court is given an opportunity to rule on the demurrer or motion, it will rule correctly, and it will not anticipate its ruling, or permit prohibition to be used to permit correction, in advance of its anticipated erroneous rulings. *Ib.*
8. ———: ———: **Insufficient Pleadings.** On prohibition the determinative question is not the sufficiency of the pleading in the trial court, where pleadings are amendable, but it is

PROHIBITION—Continued.

one of jurisdiction of the parties and subject-matter, or excess of jurisdiction; and if jurisdiction be present, and is kept within its proper channels, prohibition cannot go. *Ib.*

PROMOTERS. See Corporations, 1 to 3.

PROPERTY RIGHTS.

1. **City Ordinance: In Conflict with Statute: Retrospective: Viaduct: Public Service Commission: Suspension of Judgment.** A city ordinance requiring a railroad company to construct a viaduct or bridge over its tracks at a street crossing, at its own expense, is in conflict with the statute permitting the Public Service Commission to apportion the costs of the viaduct between the city and the railroad company; but the statute is a later enactment, and does not have a retrospective operation, and cannot be held to nullify a suit to enforce the provisions of the ordinance prosecuted to judgment before the enactment of the statute. *State ex rel. v. Railroad, 720.*
2. ———: **Suspension by Statute.** Whatever rights have been acquired by a city, and whatever has been legally done under its charter and ordinances, prior to the enactment of a statute, are beyond the power of the General Assembly to disturb by such statute. *Ib.*
3. ———: ———: **Rights Acquired by Violation of Ordinance.** If the city ordinance is valid and binding, the railroad company cannot gain any advantage by violating it. Where it appears that, if the railroad company had obeyed the ordinance requiring it to build a viaduct in a street crossed by its tracks, the viaduct would have been almost completed before the suit was brought to compel it to obey it, the courts will not listen with patience to its prayer that, as no actual work has been done on the viaduct and the later enacted statute permits the Public Service Commission to apportion the costs between the city and the company, said apportionment should be made by the courts. *Ib.*

PROSTITUTION.

1. **Instruction: Failure to Give Defendant's: Covered by State's: Enticing Female to Prostitution.** In a prosecution for taking away from her father a certain female under the age of eighteen years for the purpose of prostitution, it was not error to refuse to instruct the jury that if said girl went to the house of defendant with Lillian Cameron under the circumstances and conditions testified to by said Lillian the verdict must be for defendant, where the court instructed the jury that unless they found that the defendant took said girl from her father "for the purpose of prostitution as mentioned in this instruction, you will find her not guilty," there being no proof of a conspiracy or any connection between defendant and Lillian Cameron until prosecutrix was in defendant's house; for, although it be conceded that said instruction, though a vicious comment on the evidence and therefore not in proper form, pertained to a proper matter of defense which was complete if Lillian Cameron's testimony was true and therefore it was the duty of the court to give a proper instruction on the subject, yet the very substance of the instruction requested was embodied in the one given. *State v. Corrigan, 195.*

PROSTITUTION—Continued.

2. ———: **Taking Away Girl for Prostitution: No Definition of Taking Away, Etc.** An instruction telling the jury that if defendant did unlawfully and intentionally take away the fifteen-year old girl from her father, "for the purpose of prostitution, by having illicit intercourse with divers men," etc., thereby fully incorporating the language of the statute, is not erroneous because it does not go further and define the words "taking away for the purpose of prostitution" by stating that such taking away might have been accomplished by persuasion, enticement or inducement of money offered or means furnished by defendant; for, though said additional explanation might have been proper in view of the evidence, if its omission was an error, it was one in defendant's favor. *State v. Corrigan*, 195.
3. **Cross-Examination of Defendant: Houses of Prostitution in Other Cities: Denied.** Where, in a prosecution of an accused for taking away from her father a girl under eighteen years of age for the purpose of prostitution, the girl has testified that defendant stated to her at the time she entered her house in St. Charles that she had a house of prostitution in Jefferson City, it was not harmful error for the State to ask her on cross-examination if she had and run such a house in Jefferson City, a matter not mentioned in her examination in chief, where defendant answered that she had not. However, if defendant had admitted that she had or had run such a house in Jefferson City a different case would be up for a ruling. And since no objection was made or exception saved to the State's inquiry of her on cross-examination if she had run such a house in Columbia, the propriety of that inquiry cannot be considered on appeal. *Ib.*
4. **Evidence: Testimony of Event Subsequent to Offense: Harmless Error: Presumption That Officer Performs Legal Duty.** Where defendant was being prosecuted for taking a fifteen-year old girl away from her father for the purpose of prostitution, and a deputy sheriff was offered by the State for the purpose of showing that defendant's house was being operated by her as a house of prostitution some two or three weeks subsequent to the time the prosecutrix was taken therefrom, and the only testimony of said witness was that as such deputy sheriff he went to said house at the time indicated "with the intention of closing it," leaving as an inference that he did not close it, the error in admitting the testimony was harmless; for, it being presumed that an officer performs his legal duty, the inference is that had the house been operated as one for prostitution he would have closed it, and that he did not close it because upon examination he found it was not being so operated, and therefore the error, in so far as it was not innocuous, was in defendant's favor. *Ib.*
5. ———: **Prior Good Reputation of Prosecutrix.** It would be error to admit evidence on the part of the State of the prior good reputation of prosecutrix before the defendant had attacked her reputation. But testimony brought out by a cross-examination of the State's witness to the effect that the loathsome disease which prosecutrix had when she was taken from defendant's house of prostitution, was contracted before she went to said house, and testimony of defendant's witness that prosecutrix was on her way to another house of prostitution when said witness persuaded her to go with her to defendant's house, was as serious an attack upon prosecutrix's reputation

PROSTITUTION—Continued.

for chastity as would have been the offering of character witnesses to show her bad reputation for chastity, and authorized the State in rebuttal to show her reputation was good. *Ib.*

6. ———: Taking Away Girl for Prostitution: Intent. The gravamen of the offense of taking away from her father a girl under eighteen years of age for the purpose of prostitution, is the purpose or intent with which the taking away is accomplished; and intent is a hidden mental process, deducible in a criminal case especially, since the State may not use the defendant to prove it, from words or overt acts alone. *Ib.*
7. ———: ———: ———: Shown by Sexual Acts. That the prosecutrix was taken away for the purpose of prostitution can in no way be more clearly shown than by the fact that she was received into defendant's house of prostitution, kept there by defendant, and when occasion offered sent by defendant to a room with a man who gave her money and had sexual intercourse with her. *Ib.*
8. ———: ———: ———: Act of Rape. Nor need the act of sexual intercourse be shown to have been voluntary. The fact that it was accomplished by the forceful ravishment of the girl by a drunken man sent to her room by defendant, with all its ugly details, may be shown in evidence, as a part of the *res gestae*. Nor does the fact that the evidence of the rape and a recital of its details may add to the punishment imposed by the jury, render the evidence incompetent. *Ib.*
9. ———: ———: ———: ———: *Res Gestae*: Accessory. The details of the force used by the drunken man, sent to prosecutrix's room by defendant, are parts of the *res gestae* and are admissible against defendant, though the rape was done out of her immediate presence and not specifically commanded by her to be done. An accessory before the fact, who instigates the unlawful act, is liable; and if the acts are *res gestae* they are always admissible even though they show the commission of another crime committed in the accomplishment of the crime undertaken. *Ib.*

PUBLIC ROAD. See Roads and Highways.

PUBLIC WHARF. See Forcible Entry and Detainer.

PUNISHMENT. See Verdict, 1.

RAILROADS.

1. Constitutional Statute: Discrimination in Passenger Fares: National Guard. The National Guard when traveling on orders from the Governor travel at the expense of the State, and a statute which requires them to be carried at one cent a mile is a discrimination in favor of the State, and not one between "transportation companies and individuals;" and, therefore, said statute is not violative of Sec. 23 of Art. 12 of the Constitution, which declares that "no discrimination in charges or facilities in transportation shall be made between transportation companies and individuals, or in favor of either, by abatement, drawback or otherwise," since such constitutional provision does not apply. *State v. M. K. & T. Ry. Co.*, 507.

RAILROADS—Continued.

2. ———: ———: ———: One Cent Fare: Sec. 14 of Art. 12: A Command is an Implied Inhibition. A statute (Sec. 8396, R. S. 1909) which requires railroad companies to carry members of the organized militia, traveling on the order of the Governor, at one cent per mile, while they are authorized to charge all private individuals and other officers of the State two cents per mile, is violative of Sec. 14 of Art. 12 of the Constitution of Missouri, which declares that "the General Assembly shall pass laws to correct the abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads of this State." That provision not only lays upon the Legislature the duty to do an express thing, but it lays upon it an inhibition not to do a diametrically opposite thing. The command being that the Legislature shall enact laws to prevent unjust discrimination, that command forbids the Legislature to enact laws whose effect is to produce a plain discrimination.
Held, by GRAVES, J., concurring, that Sec. 14 of Art. 12 is not the only provision of the Constitution which authorizes the Legislature to fix maximum passenger or freight rates; on the contrary, rate-making is a legislative matter, and the constitutional provision (article III) vesting the legislative power in the General Assembly gave full power to the Legislature to pass laws fixing maximum railroad rates of all kinds. *State v. M., K. & T. Ry. Co.*, 507.
3. ———: Discrimination in Favor of State. Said constitutional provision applies to a statute which makes an unjust discrimination in favor of the State. Nothing in its alleged sovereignty or in the fact that by its Constitution railroads are declared to be "public highways," will serve to absolve the State from the application to it of its own Constitution and statutes. The constitutional provision forbidding unjust discrimination in passenger and freight rates is binding upon the State, and a statute which attempts to make such discrimination in favor of the State is invalid. *Ib.*
4. ———: ———: Unjust: Arbitrary. The mere fact that a legislative act fixes a difference in passenger rates does not necessarily constitute an unjust discrimination. If the difference in rates be based upon a reasonable and fair difference in conditions which equitably and reasonably justify a different rate, it is not an unjust discrimination. But a legislative act which requires railroads to carry members of the National Guard to attend target practice, or upon other military duty, at the order of the Governor, upon regular trains, without regard to number, at any hour of the day or night, and to give them all the privileges accorded to other passengers, but at one-half the price fixed by law for carrying others, prescribes an arbitrary and unjust discrimination, and is violative of Sec. 14 of Art. 12 of the Constitution. *Ib.*
5. ———: ———: Rates Fixed by General Act Presumed to Be Reasonable. A rate of two cents per mile for carrying all adult passengers, fixed by a statute enacted only a short time before a special act declaring the rate for carrying members of the National Guard shall be one cent, is *prima-facie* reasonable, and will be so held when the question of whether the one-cent rate fixed by the later act is an unjust discrimination is up for determination. *Ib.*

RAILROADS—Continued.

6. ———: ———: **As Affected by Public Utilities Act: Obliter.** Courts do not determine questions which are not live issues and whose determination is not necessary for a proper disposition of the case in hand. Having reached the conclusion that the statute requiring railroad companies to carry members of the National Guard when on military duty at one cent per mile establishes an unjust discrimination and is therefore void, it is not necessary to determine whether under the Public Utilities Act of 1913 the Public Service Commission is given power to fix railroad passenger rates, or if it has been given such power it was an unconstitutional delegation of legislative power.
Held, by GRAVES, J., that the question of the power of the Public Service Commission to fix passenger and freight rates which railroads may charge is involved in this case and should be decided now. *Ib.*
7. **Master and Servant: "Operating Railroad:" Fellow-Servant Act: Car Repairer.** A car repairer while working at his task in the repair yards of a railroad company is "engaged in the work of operating such railroad" within Sec. 5434, R. S. 1909, and is entitled to damages from the company for injuries caused by the negligence of a fellow-servant. *Powers v. Railroad*, 701.
8. **Viaduct Over Street: Overhead or Under Tracks: Option.** Under the charter of the city of St. Louis the Missouri Pacific Railway Company does not possess an option to cause streets to pass over or under its tracks, and mandamus will lie to compel it to obey an ordinance requiring it to construct a viaduct over its tracks crossing a public street. In ordering the abolition of a grade crossing the city proceeds under the authority of its charter, which is an exception to the general statutes pertaining to the subject. *State ex rel. v. Railroad*, 720.
9. **Ordinance: Recital of Reasons for its Enactment: Viaduct Over Street.** A legislative body need not recite the reasons which move it to enact a law. The law when enacted furnishes its own reasons. A railroad company cannot refuse to obey an ordinance requiring it at its own expense to construct a steel viaduct over its tracks at a street crossing for that the ordinance does not declare the existing grade crossing a public nuisance, or that it is dangerous, or states no reason for requiring a separation of grades at said crossing. *Ib.*
10. **Viaduct at Street Crossing: No Benefit District.** A railroad company is not justified in refusing to obey an ordinance of the city of St. Louis requiring it to construct at its own expense a steel viaduct over its tracks at a certain street crossing, because certain statutes intended to apply to cities of the first class require the establishment of a benefit district "to pay for the damages which may be caused to any property by reason of the construction of such subway or viaduct," and no such benefit district has been established; for, said city is not of the category of cities of the first class, but is organized under a special freeholders' charter authorized by the Constitution, and said statutes do not apply. *Ib.*
11. ———: **Title of Street: Admitted in Return.** The title to public streets is necessarily in the city; and if defendant in its return to the writ of mandamus commanding it to construct a viaduct over its tracks at a certain street crossing, admits

RAILROADS—Continued.

that the street was at all times a public street, it will not be heard to contend that the title to the street is in it. *State ex rel. v. Railroad*, 720.

12. ———: **Unreasonable Ordinance: Must Be Plead.** When a defendant wishes to avoid the provisions of an ordinance on the ground that they are unreasonable, the particular facts which render them invalid should be pleaded. A general allegation that the "ordinance is unreasonable upon its face, is unjust and oppressive, and was passed without due consideration and without affording defendant an opportunity to be heard," is not sufficient to authorize a court to hold that an ordinance requiring defendant to construct at its own expense a steel viaduct over its tracks at a street crossing is unreasonable. *Ib.*

RAVISHMENT OF FEMALE.

1. **Pleading: Proof: Surplusage.** Proof is required of those allegations only that are necessary to a recovery, and those unnecessary to that end may be eliminated as surplusage. *Wessel v. Lavender*, 421.
2. ———: ———: ———: **Action for Ravishing Unconscious Female: Cause of Unconscious State: Not an Issue: Instructions.** Where the petition in an action for damages for ravishment alleged that the defendant, a physician, administered medicine to the plaintiff while she was sick in bed, and she having become unconscious under the influence of the medicine, the defendant had sexual intercourse with her, the cause of the plaintiff's unconsciousness was not an issue, and the giving of an instruction requiring a finding that it resulted from the medicine was reversible error. *Ib.*
3. **Action for: Female's After-agreement to Keep Silent: Her Testimony.** Where there is reversible error in an instruction, a verdict for the defendant in an action for damages for ravishment will not be affirmed on the ground that the testimony of the plaintiff, who had agreed to keep silent in consideration of a payment to be made to her by the defendant, was unworthy of belief. *Ib.*

REMARKS OF COUNSEL. See Attorneys.**RES ADJUDICATA.**

1. **Former Adjudication: Action by State for Taxes.** The doctrines of *res adjudicata* and estoppel by judgment apply to actions by the State for the collection of taxes. And an adjudication is not only conclusive against the State as to the very taxes which were its subject, but its effect extends to those incidental questions actually and necessarily decided in reaching the judicial result. *State ex rel. v. Mining Co.*, 490.
2. ———: ———: **Matters Concluded.** Where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit between the same parties upon a different claim or demand, the inquiry must always be as to the point or question actually litigated and determined in the original action, not as to what might have been thus litigated and determined. Only upon such matters is the judgment in the first action conclusive in the second. *Ib.*

RES ADJUDICATA—Continued.

3. ———: ———: ———: **Incorporation of Town.** Where certain city taxes assessed against defendant's property were held invalid on the theory that the ordinance of incorporation as a city of the fourth class was unreasonable in including such property, and the original order of incorporation as a town by the county court, which also included defendant's property, was not pleaded or in issue, the judgment is not conclusive, in a subsequent suit for other taxes, of the question whether defendant's property was rightly included in the city by the county court's order of incorporation. *Ib.*

RES GESTAE.

1. **Enticing Girl to House of Prostitution: Sexual Relation: Result of Rape.** In the trial of a woman charged with taking away a female under eighteen years of age for the purpose of prostitution, it is not necessary that the act of sexual intercourse be shown to have been voluntary. The fact that it was accomplished by the forceful ravishment of the girl by a drunken man sent to her room by defendant, with all its ugly details, may be shown in evidence, as a part of the *res gestae*. Nor does the fact that the evidence of the rape and a recital of its details may add to the punishment imposed by the jury, render the evidence incompetent. *State v. Corrigan*, 195.
2. ———: ———: ———: **Accessory.** The details of the force used by the drunken man, sent to prosecutrix's room by defendant, are parts of the *res gestae*, and are admissible against defendant, though the rape was done out of her immediate presence and not specifically commanded by her to be done. An accessory before the fact, who instigates the unlawful act, is liable; and if the acts are *res gestae* they are always admissible even though they show the commission of another crime committed in the accomplishment of the crime undertaken. *Ib.*

RIGHTS OF PROPERTY. See Property Rights.

ROADS AND HIGHWAYS.

1. **Public Road: Appeal from Award of Damages to One Land Owner: Rights of Another.** It is only errors that affect appellant or plaintiff in error that are reversible. On an appeal by the county in a proceeding to establish a public road, from a judgment on the issue raised by one landowner by his exceptions to the *quantum* of damages awarded him, the county cannot be heard to interpose the right of another landowner whose land was taken and abided the report of the commissioners awarding him no damages. Such other landowner does not complain, and the county cannot complain for him. *Howell v. Jackson County*, 403.
2. ———: **Failure to File Exceptions to Commissioners' Report.** A landowner whose land is taken for a public road who fails to file exceptions to the commissioners' report awarding him no damages, cannot thereafter, if the county court had jurisdiction of all the landowners and the subject-matter, claim damages. *Ib.*
3. ———: ———: **Raised by County.** On an appeal by the county from the judgment of the circuit court awarding dam-

ROADS AND HIGHWAYS—Continued.

ages to one landowner who excepted to the award made by the commissioners and appealed from the verdict of a jury in the county court, such landowner cannot be punished because another who did not except to the report of the commissioners was awarded no damages for his land taken. The county after trial in the circuit court cannot except for the non-excepting landowner, nor compel him to come into court, and the landowner who did except is in no wise responsible for his failure to except. *Howell v. Jackson County*, 403.

4. ———: ———: **Not Raised Below.** Unless the point was made in the circuit court that no damages were awarded by the commissioners to a non-excepting landowner whose land was taken for the public road, it cannot be considered on appeal. *Ib.*
5. ———: **Appeal to Circuit Court: Matters for Consideration: Judgment.** Where the county court found the road to be necessary and entered judgment establishing it, and a landowner appeals to the circuit court solely from the award of damages to him, the judgment of the county court establishing the road is not drawn in question or put in jeopardy by the appeal, and to that extent the judgment remains final, operative and self-enforcing, and it is not necessary for the judgment of the circuit court to find the jurisdictional facts upon which the location and establishment of the public road depends. *Ib.*
6. ———: ———: ———: **Affidavit for Appeal: Merits.** An affidavit for appeal by a landowner from the award of damages by the jury in the county court to him for land taken in which it is stated that he "is injured by the verdict of the jury and the judgment of the court, and this appeal is from the merits and an order and judgment taxing costs," when fairly read, means that the appeal was taken only from the verdict and judgment for damages and costs, the word "merits" being due to the statutory relation between appeals from justices' courts and from county courts. *Ib.*
7. ———: ———: **Liability of County for Damages.** When the county court has found the proposed road to be of sufficient public utility to warrant its establishment at the expense of the county, has caused it to be opened and has taken possession, the county thereby becomes irrevocably bound, by its own election, to pay the damages assessed in the circuit court in favor of a landowner whose property was taken for the road and who excepted to the commissioners' award and to the verdict of the jury in the county court, and appealed to the circuit court on the issue of the amount of damages alone. *Ib.*
8. ———: **Measure of Damages: Fences: Twice Added.** In estimating the damages to a landowner caused by constructing a public road through his land, the jury may be instructed that, in estimating his damages, they may take into consideration the cost of building a new fence, when such fence is necessary; but they should not be told to "consider the quantity and value of the land taken for the road, and also the cost of building the necessary fences along said road, and damage to the whole tract of land of which that taken forms a part, and from the sum of these deduct the benefits peculiar to such

ROADS AND HIGHWAYS—Continued.

tract;" for that is, in effect, by loose language, to tell them to add the cost of the fence to the sum of the value of the land taken and damage to that not taken, when, in fact, the cost of fencing is but one of the elements that go to swell the owner's damage. *Ib.*

9. ———: ———: ———: ———: Error Corrected on Appeal. Where the verdict is swollen by a definitely ascertained and segregated erroneous amount, the false item may be eliminated by excision, by requiring a *remititur*. Where the instruction authorized the jury to return a verdict for the value of constructing a fence made necessary by the establishment of a public road, in addition to the value of the land taken and damage to that not taken, and all the witnesses agree on the cost of such a fence, that cost will be deducted from the gross amount of the verdict for damages, as a condition of affirmance. *Ib.*

ROBBERY.

1. **Stealing from Person of Another: Sufficient Evidence.** The evidence in this case, though the account of the theft by the prosecuting witness is rambling, probably due to his natural stupidity, was sufficient to take the case to the jury, under an indictment charging defendant with having taken \$125 from the person of said witness, as they walked along a public street. *State v. Barrett*, 165.
2. **At Common Law.** At common law the elements of robbery were practically the same as under the statute, Sec. 4530, R. S. 1909; and therefore common-law adjudications on the subject aid in understanding the statute. *State v. Parker*, 169.
3. **One Offense: Two Methods.** The statute (Sec. 4530, R. S. 1909) denounces but one offense of robbery from the person, which, however, may be committed in two ways, namely; By the felonious taking of the property of another from his person (a) by violence or (b) by putting him in fear of some immediate injury to his person. And if there is neither violence nor putting in fear, the taking of \$2.25 from another's pocket is not robbery in the first degree, but larceny. *Ib.*
4. **Fear: After Crime Has Been Committed.** Where the theft of \$2.25 from another's pocket, accomplished by the accused placing his hand in his pocket and extracting the money therefrom while an accomplice engaged him in conversation, no blow being struck or threatened, no weapon being used or shown, no threat of injury, either immediate or remote, being uttered, and the only fear being that after the money was taken he became frightened, there is no "putting in fear" in the sense in which those words are used in the statute. *Ib.*
5. **Violence: Extracting Loose Coins.** Where the coins stolen were lying loose in another's pocket, and the thief, while an accomplice engaged him in conversation, inserted his hand in his pocket and extracted them, no force or violence being necessary to extract them and there being no knowledge that they were being extracted until the hand was felt in the pocket, there was no such violence as to constitute robbery in the first degree. The violence used in the robbery must precede or be contemporaneous with the taking of the property. [Distinguishing *State v. Broderick*, 59 Mo. 318.] *Ib.*

ROBBERY—Continued.

6. **Convicted of Larceny.** Under an indictment for robbery the accused may, in a proper case, be convicted of larceny. And where the trial court should have sustained defendant's instruction in the nature of a demurrer to the evidence, since it fails to show he was guilty of robbery, yet as it does show that he was guilty of larceny, he will not, on his appeal, be discharged, but the judgment will be reversed, and the cause remanded for further procedure according to the law and the facts. *State v. Parker*, 169.
7. **Instruction: Recent Possession.** An instruction set out in paragraph three of the opinion, on the subject of recent possession of stolen money and the duty of defendant to explain his possession of it, does not assume that the money found in possession of defendant was the identical money stolen from the prosecuting witness, but requires the jury to find that the money found in defendant's possession was recently stolen from such witness before they are permitted to presume that defendant was the party who stole it. *State v. Levy*, 181.
8. **Money: Coins and Bills: Identification: Presumption Arising From Possession.** The prosecuting witness, as he boarded a street car, felt "an unusual disturbance" in his trouser's pocket. Before the car started he discovered his pocketbook was gone, and he immediately got off the car. A police officer, on the car, saw defendant hurry through the car and get off at the front end, and his suspicions were aroused, and he also got off in time to see defendant board another car going in the opposite direction. Upon being informed by the prosecuting witness that his pocketbook had been stolen, the officer followed defendant on the next car and overtook him at a cross street as he was coming down towards the car track, and when asked what he was doing there he replied that he had gone to that cross street to see a lumberman, but had failed to find him. There was no lumber yard or office in that part of the city. The prosecuting witness testified that he had in his pocketbook when it was stolen, two twenty-dollar bills, one five-dollar bill and a ten-dollar gold piece dated 1902; also five pennies which he had carried for some time as keepsakes, and that they were dirty and one of them of a dark color. When defendant was searched, in one pocket was found a roll of one-dollar bills "nicely folded," and in another two twenty-dollar bills and one five-dollar bill, not folded, but "all crumpled up," and five pennies of the same color and description as those the prosecuting witness had in his pocketbook. No ten-dollar gold piece was found in his pocket, but when his underclothes were removed a ten-dollar gold piece dated 1902 fell out of them. The police officer then went to the cross-street where defendant was arrested, and about three hundred feet from where the arrest was made found the empty pocketbook. *Held*, that both coins and bills frequently become so discolored or worn as to give them a peculiar appearance by which they can be identified with reasonable certainty, and the stolen money was sufficiently identified to warrant an instruction on the presumption of guilt arising from possession of recently stolen property. *Ib.*

SECRET PROFITS. See Corporations, 1 to 3.

SETTING ASIDE FORECLOSURE SALE. See Mortgages and Deeds of Trust.

SEWERS.

Contract for: Previous to Detailed Plans and Materials. Sec. 5848, R. S. 1909, does not require a city of the third class to define by ordinance the dimensions of a district sewer and the materials out of which it is to be constructed prior to the enactment of an ordinance accepting a bid for the construction of the sewer, and hence a decision of a Court of Appeals founded on that statute and so holding, is not in conflict with a prior decision of the Supreme Court founded on an ordinance of Kansas City requiring detailed plans and specifications to be made and filed for the information of all persons desiring to bid on the work, and holding that such plans and specifications must be filed before the contract is entered into. *State ex rel. v. Robertson*, 535.

SIDEWALKS.

1. **Changing Grade: City of Third Class.** Secs. 9258 to 9275, R. S. 1909, provide in detail every step to be taken in order to assess the damages and benefits that may accrue on account of the change of the grade of a street and the construction of a sidewalk in front of abutting property. *Kirksville v. Ferguson*, 661.
2. **Change in Grade.** The ordinance ordering the sidewalk to be constructed must be read in connection with the one authorizing the assessment of damages and benefits; and while it may simplify matters if the one authorizing the assessment also establishes the grade or proposed change of grade of the sidewalk, yet if the one ordering the sidewalk to be built says that the top surface of the walk to be constructed "shall, when finished, conform to the grade stakes of the city engineer now set and in place," it will not be held that the grade is so uncertain and indefinite as to authorize a dismissal of the proceeding. *Ib.*
3. ———: **Removal of Stakes.** The fact that the stakes fixed by the city engineer to mark the grade of a sidewalk may be removed or destroyed and are not permanent does not authorize the court to rule that the grade of the sidewalk whose top surface is required by the ordinance to "conform when finished with the grade stakes of the city engineer now set and in place" is so indefinite and uncertain that the proceeding brought by the city to construct the sidewalk must be dismissed. The permanency of grade monuments is a matter to be addressed to the city government, and not to the courts; and their purpose is to indicate the grade line to the commissioners who assess the damages and benefits, and to inform the contractors where to place the surface of the sidewalk. *Ib.*

SPECIFIC PERFORMANCE.

1. **Contracts: Cancellation: Fraud: Mutuality.** A widow and two children, Sarah and Noel, survived John F. Gilbirds, who died intestate seized of the legal title to 840 acres of land heavily encumbered. Sarah sued to enforce an alleged oral agreement to partition, and appealed to the Supreme Court from a decree vesting the title to all the land in the widow, her mother. The widow thereafter executed a deed to a trustee, which empowered him to manage the property, or if need be sell any part of it, for the purpose of paying off the incumbrances, together with debts of the grantor amounting to over \$1800, the remainder to go to her for life and then in fee to her son and his wife. At

SPECIFIC PERFORMANCE—Continued.

about the same time she contracted to sell a portion of the land, and when she found she could not perfect title on account of Sarah's pending appeal in the partition suit, she entered into a contract with Sarah and her husband, dated April 28, 1909, by which it was agreed that the trustee should convey to the widow for life, with remainder in Sarah; that Sarah should dismiss her appeal in the partition suit; that the proceeds of a sale of 334 acres, for which all parties agreed to make deeds, should go to pay the widow's debts and reduce the incumbrances; that the widow should, for her life, lease the remainder to Sarah and her husband for \$300 a year, the lessees to pay all taxes and insurance; and that the lessees should have the right to sell, "as soon as practicable and on the best terms obtainable," all or any portion of the premises to further reduce the incumbrances, the widow agreeing to join in all deeds necessary to carry out any such contract of sale. Sarah's appeal was dismissed and the provisions of the contract were carried out, until Sarah's husband, in July, 1910, made a contract, which Sarah afterwards ratified, for the sale of sixty-four acres of the remaining land, whereupon the widow refused to join in a deed. To a suit for specific performance brought by Sarah, her husband and the contracting purchaser, the widow answered asking that the contract of April, 1909, be cancelled as unconscionable, not supported by valid consideration, and procured by false representations. She testified that, to induce her to sign, her daughter told her the \$300 a year rent was a mere form—that she should never want. The evidence shows that the income from the premises was only about \$865 a year which left very little in the hands of Sarah and her husband after they made the payments specified in the contract of 1909.

Held, that, in view of all the facts, the trial court's refusal to cancel the contract of 1909 must be upheld, especially since there is no showing in the record that Sarah's appeal in the partition suit was other than meritorious, or that she refused or failed to carry out her promise to provide additional support for her mother.

Held, also that, since the contract of 1910, which must be considered together with that of 1909, definitely fixed the price and described the land; was mutual as regards the widow and the purchaser; was a sale "as soon as practicable and on the best terms obtainable," and was ratified by Sarah, the trial court was right in decreeing that the widow should perform specifically by joining in a deed to the purchaser. *Forgey v. Gilbirds*, 44.

2. —: Undisclosed Principal. Specific performance may be enforced either by or against an undisclosed principal when his duly authorized agent, in his own name, within the scope of the agency, has contracted concerning the sale or purchase of the principal's land. *Ib.*
3. Defective Title. Where the agreement for the exchange of lands was that each party should furnish an abstract of title to the property to be conveyed by him, showing a good title in him, and if the abstract failed to show a good title in him then he should make such corrections as might be necessary to perfect it, plaintiff cannot have a decree for specific performance unless he has a good title. *Munyon v. Hartman*, 449.

SPECIFIC PERFORMANCE—Continued.

4. ———: **Admission of Defects.** The institution of a suit in the circuit court and at the same term, by plaintiff, to quiet title to a part of the land for which he seeks a decree of specific performance of a contract to convey to him, is a solemn admission of record that he does not own a good title to the entire tract, and is a bar to his right to a decree for specific performance, where the contract to convey calls for a good title. *Ib.*

STATUTES AND STATUTORY CONSTRUCTION.

1. **Negligence: Recovery for Death: Law of Kansas: Liberally Construed.** Section 4871, General Statutes of Kansas, 1901, providing for a recovery by the personal representatives for a wrongful killing, if the person killed might have maintained an action had he lived, is coeval with the State of Kansas, is remedial in character, and should receive a liberal interpretation. *Diariotti v. Railroad*, 1.
2. ———: ———: ———: ———: **Notice.** Section 4871, General Statutes of Kansas 1901, provides that when the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action had he lived. Section 1, chap. 393, Laws of Kansas 1903, provides that a railroad operating in that State shall be liable to any employee for all damages done to him through the negligence of its agents, engineers or other employees, provided that notice in writing of the injury shall have been given "by or on behalf of the person injured" within 90 days after the accident. *Held*, that the words concerning notice in Sec. 1, chap. 393, do not apply to an action under Sec. 4871, because notice can be given neither by the dead nor in their behalf, and the provision does not include notice given in behalf of one entitled to damages for the death of another. [WOODSON, J., dissents.] *Ib.*
3. **Appeal: Failure to Perfect: Filing Bill of Exceptions: Law of 1911 and Sec. 5313.** The amendment to section 2029, Revised Statutes 1909, found in Laws 1911 at page 139, does not authorize an appellant in a criminal case to file a transcript of his bill of exceptions in the Supreme Court at any time before the rules of the court require him to serve his abstract of the record upon respondent; for there is nothing in said amendment evincing any intention on the part of the General Assembly to repeal section 5313, Revised Statutes 1909, requiring appeals in criminal cases to be perfected within one year; and before a statute can be repealed there must be either a legislative design to repeal, or an irreconcilable conflict between the old and new law. *State v. Moulton*, 137.
4. ———: ———: ———: **Suggestion of Good Cause.** By the express words of Sec. 5313, R. S. 1909, if a defendant in a criminal case fails to perfect his appeal within one year, he may avoid the dismissal thereof when the Attorney-General has moved to dismiss, by showing to the satisfaction of the Supreme Court "good cause" for not sooner perfecting his appeal, and that right he still has since the amendment of 1911 to section 2029, but the duty still rests on him to make a satisfactory showing that he has been unremitting in his diligence to perfect his appeal within twelve months after it was

STATUTES AND STATUTORY CONSTRUCTION—Continued.

- granted, and if he fails to make any showing his bill of exceptions cannot be considered. Said amendment applies to appeals in criminal cases, in so far as it permits the filing of bills of exceptions after the time granted by the trial court for filing has expired, provided such delay is not the result of appellant's own act of omission. *State v. Moulton*, 137.
5. **Robbery: At Common Law.** At common law the elements of robbery were practically the same as under the statute, Sec. 4530, R. S. 1909; and therefore common-law adjudications on the subject aid in understanding the statute. *State v. Parker*, 169.
6. —: **One Offense: Two Methods.** The statute (Sec. 4530, R. S. 1909) denounces but one offense of robbery from the person, which, however, may be committed in two ways, namely: By the felonious taking of the property of another from his person (a) by violence or (b) by putting him in fear of some immediate injury to his person. And if there is neither violence nor putting in fear, the taking of \$2.25 from another's pocket is not robbery in the first degree, but larceny. *Ib.*
7. —: **Fear: After Crime Has Been Committed.** Where the theft of \$2.25 from another's pocket, accomplished by the accused placing his hand in his pocket and extracting the money therefrom while an accomplice engaged him in conversation, no blow being struck or threatened, no weapon being used or shown, no threat of injury, either immediate or remote, being uttered, and the only fear being that after the money was taken he became frightened, there is no "putting in fear" in the sense in which those words are used in the statute. *Ib.*
8. **Assault: Decree: Instruction.** Section 4482, Revised Statutes 1909, does not purport to include any class of assaults except those for which no punishment has been prescribed by preceding sections, and as the crime of assault with intent to kill by shooting at a human being is specifically prohibited and the punishment therefor prescribed by section 4481, it is not error to decline to instruct upon the crime of assault denounced by section 4482 where defendant is charged with the offense denounced by section 4481. *State v. Curtner*, 214.
9. **Election: Coalition of Parties: Printing Names on Different Tickets.** The Act of 1913, prohibiting party fusion and denying to a candidate of one political party the right to have his name also printed on the party ticket of another political party as its candidate for the same office, having been held unconstitutional (261 Mo. 515), the county clerk has no power to refuse to print the name of a candidate for Representative upon the tickets of two political parties, where he has been nominated at a primary election by one of such parties, and substituted by the county committee of the other in the stead of its own candidate for the same office who has resigned. The statutes as they now stand do not prohibit a man from being the candidate of two political parties.
- Held*, by GRAVES, J., dissenting, with whom WOODSON, J., concurs, that the Act of 1913 prohibiting fusion of political parties is not unconstitutional, as held in *State ex rel. Schmoll v. Drabelle*, and whether it received the number of votes required by the Constitution was a question for the legislative body to determine, and that act being valid

STATUTES AND STATUTORY CONSTRUCTION—Continued.

the peremptory writ of mandamus should be denied. *State ex rel. v. Seibel*, 220.

10. ———: ———: ———: **Sec. 5848, R. S. 1909: Not Question for County Clerk.** It is not for the county clerk to determine that the attempted substitution upon its party ticket of a candidate of another party for the same office, by the county committee, in the stead of its own nominee who has resigned, is in violation of Sec. 5848, R. S. 1909, providing that "no committee shall have the power to substitute, to fill any vacancy, the name of any person who is not known to be of the same political belief and party as the person for whom he is substituted." That section lays a duty upon the party committee, but it lays none on the county clerk, and it does not authorize him to exercise the judicial function of saying that the person substituted is known not to be of the same political belief and party as the person for whom he is substituted. *Ib.*
11. ———: **Candidates: Payment of Filing Fee.** *Held*, by BROWN, J., that a county clerk cannot refuse to print the name of a candidate for office on the party ticket on the sole ground that he had not paid the filing fee to the committee treasurer required by Sec. 5879, R. S. 1909. Said requirement is violative of the constitutional provision (Art. 2, sec. 9) ordaining that "all elections shall be free and open." That provision applies to both candidates and voters. Such a statute is against sound public policy. *Ib.*
12. **Ejectment: Description of Land: Statute Authorizing Correction of Mistake.** Sec. 1848, R. S. 1909, declaring that the court, at any time before final judgment, in furtherance of justice, and on such terms as may be proper, may amend any pleading by correcting "a mistake in any other respect," authorizes the court to permit plaintiff in ejectment to file an amended petition changing the description of the land sued for; and a record entry showing that "leave is granted plaintiff to file an amended petition correcting error in description" is a finding by the court that a mistake was made in the description of the land in the original petition, and those things appearing it will not be held that the amended petition was the substitution of a new and different cause of action. *Broyles v. Eversmeyer*, 384.
13. **Misjoinder: Several Causes.** The statute (Sec. 1795, R. S. 1909) provides that several causes of action may be united in the same petition, whether they be legal or equitable or both, where they arise out of the same transaction or transactions connected with the same subject of action, but the causes so united must all belong to one of the classes mentioned in the statute, and "must affect all the parties to the action." *Trefny v. Elchenseer*, 436.
14. **Unjust Discrimination: In Favor of National Guard: One Cent Fare: Sec. 14 of Art. 12: A Command is an Implied Inhibition.** A statute (Sec. 8396, R. S. 1909) which requires railroad companies to carry members of the organized militia, traveling on the order of the Governor, at one cent per mile, while they are authorized to charge all private individuals and other officers of the State two cents per mile, is violative of Sec. 14 of Art.

STATUTES AND STATUTORY CONSTRUCTION—Continued.

12 of the Constitution of Missouri, which declares that "the General Assembly shall pass laws to correct the abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads of this State." That provision not only lays upon the Legislature the duty to do an express thing, but it lays upon it an inhibition not to do a diametrically opposite thing. The command being that the Legislature shall enact laws to prevent unjust discrimination, that command forbids the Legislature to enact laws whose effect is to produce a plain discrimination.

Held, by GRAVES, J., concurring, that Sec. 14 of Art. 12 is not the only provision of the Constitution which authorizes the Legislature to fix maximum passenger or freight rates; on the contrary, rate-making is a legislative matter, and the constitutional provision (article III) vesting the legislative power in the General Assembly gave full power to the Legislature to pass laws fixing maximum railroad rates of all kinds. *State ex rel. v. Railroad*, 507.

15. ———: ———: ———: **As Affected by Public Utilities Act: Obiter.** Courts do not determine questions which are not live issues and whose determination is not necessary for a proper disposition of the case in hand. Having reached the conclusion that the statute requiring railroad companies to carry members of the National Guard when on military duty at one cent per mile establishes an unjust discrimination and is therefore void, it is not necessary to determine whether under the Public Utilities Act of 1913 the Public Service Commission is given power to fix railroad passenger rates, or if it has been given such power it was an unconstitutional delegation of legislative power. *Held*, by GRAVES, J., that the question of the power of the Public Service Commission to fix passenger and freight rates which railroads may charge is involved in this case and should be decided now. *Ib.*
16. **Sidewalk: Changing Grade: City of Third Class.** Secs. 9258 to 9275, R. S. 1909, provide in detail every step to be taken in order to assess the damages and benefits that may accrue on account of the change of the grade of a street and the construction of a sidewalk in front of abutting property. *Kirksville v. Ferguson*, 661.
17. **Partition: Conveyance in Tail: Life Tenant Living: Contingent Remainders.** Under Sec. 2872, R. S. 1909, providing that one who by the laws of England would have become seized in fee tail of lands, shall be deemed to be seized for his life only, the remainder to pass in fee to those to whom the estate would have first passed by the common law at his death, and Sec. 2874, which provides that the remaindermen shall take as purchasers, the grantee in a deed reading to her and her "body heirs" cannot, without statutory authority, have the land sold for partition between her and her children and thus destroy the reversion. *Stockwell v. Stockwell*, 671.
18. ———: ———: ———: ———: **Sec. 2559, R. S. 1909.** Sec. 2559, R. S. 1909, providing that where lands are held in joint tenancy, tenancy in common, or coparcenary, including estates in fee, for life, or for years, tenancy by the curtesy and in dower, any of the parties interested may maintain a suit for partition, affords no authority to a grantee in a deed to her

STATUTES AND STATUTORY CONSTRUCTION—Continued.

- and her bodily heirs to maintain partition between her and her children. *Ib.*
19. ———: ———: ———: ———: Sec. 2612, R. S. 1909. Sec. 2612, R. S. 1909, providing that if in any case, from the nature and amount of the property to be divided, and the number of the owners, partition in kind cannot be made without great prejudice to the owners, an order of sale may be made without the appointment of commissioners, leaves to Sec. 2559 the designation of the title necessary to maintain the proceeding, and gives a contingent remainderman no right to a sale for partition. *Ib.*
20. City Ordinance: In Conflict with Statute: Retrospective: Viaduct: Public Service Commission: Suspension of Judgment. A city ordinance requiring a railroad company to construct a viaduct or bridge over its tracks at a street crossing, at its own expense, is in conflict with the statute permitting the Public Service Commission to apportion the costs of the viaduct between the city and the railroad company; but the statute is a later enactment, and does not have a retrospective operation, and cannot be *held* to nullify a suit to enforce the provisions of the ordinance prosecuted to judgment before the enactment of the statute. *State ex rel. v. Railroad, 720.*
21. ———: Suspension by Statute. Whatever rights have been acquired by a city, and whatever has been legally done under its charter and ordinances, prior to the enactment of a statute, are beyond the power of the General Assembly to disturb by such statute. *Ib.*
22. ———: ———: Rights Acquired by Violation of Ordinance. If the city ordinance is valid and binding, the railroad company cannot gain any advantage by violating it. Where it appears that, if the railroad company had obeyed the ordinance requiring it to build a viaduct in a street crossed by its tracks, the viaduct would have been almost completed before the suit was brought to compel it to obey it, the courts will not listen with patience to its prayer that, as no actual work has been done on the viaduct and the later enacted statute permits the Public Service Commission to apportion the costs between the city and the company, said apportionment should be made by the courts. *Ib.*

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United States Statutes.

27 Stat. at Large, p. 531, ch. 196, see page 489.

Revised Statutes 1909.

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- Section 650, see pages 335, 338.
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- p. 113, see page 340
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General Statutes 1845.

- p. 219, sec. 5, see page 676.
 p. 442, sec. 4, see page 677.
 p. 1048, see page 503.

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p. 177, sec. 30, see page 130.

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p. 232, see page 553.

p. 266, sec. 62, see page 553.

p. 327, sec. 5891, see page 224.

p. 583, see page 532.

p. 651, sec. 139, see page 730.

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pp. 193-194, see page 179.

p. 206, see page 553.

p. 333, sec. 44, see page 733.

Laws 1909.

pp. 368, 369, see page 514.

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STREET CROSSINGS. See Viaduct.

SUBSTITUTION OF CANDIDATES ON TICKETS. See Elections.

TAKING AWAY GIRL TO HOUSE OF PROSTITUTION. See Prostitution.

TAXES AND TAXATION.

1. Constitutional Question: Elk's Club Rooms Not Exempt. Premises owned by the Benevolent and Protective Order of Elks, and used for the entertainment and refreshment of the members and their guests, are not exempt from taxation

TAXES AND TAXATION—Continued.

under the provisions of Sec. 6, Art. 10, of the Constitution, exempting lots used exclusively for purposes purely charitable. *B. P. O. E. v. Koeln*, 444.

2. **Former Adjudication: Action by State for Taxes.** The doctrines of *res adjudicata* and estoppel by judgment apply to actions by the State for the collection of taxes. And an adjudication is not only conclusive against the State as to the very taxes which were its subject, but its effect extends to those incidental questions actually and necessarily decided in reaching the judicial result. *State ex rel. v. Mining Co.*, 490.
3. ———: **Matters Concluded: Action by State for Taxes: Incorporation of Town.** Where certain city taxes assessed against defendant's property were held invalid on the theory that the ordinance of incorporation as a city of the fourth class was unreasonable in including such property, and the original order of incorporation as a town by the county court, which also included defendant's property, was not pleaded or in issue, the judgment is not conclusive, in a subsequent suit for other taxes, of the question whether defendant's property was rightly included in the city by the county court's order of incorporation. *Ib.*
4. **Board of Equalization: Certification of City Assessment: Yields to Land List.** While the certification of a city assessment by the county clerk, who is by statute secretary of the county board of equalization, is a sufficient authentication, yet the corrected land list of the county assessor is the original record of the equalized assessment, and the city assessment must yield to it. *Ib.*
5. **City of Fourth Class: Assessment: Valuation Not to Exceed That for County Purposes.** Under Sec. 11, Art. 10, of the Constitution, declaring that the valuation of property for city taxes shall not exceed the valuation of the same property for State and county purposes, and under Sec. 9347, R. S. 1909, providing that the city and county assessors shall jointly assess the property in a city of the fourth class and after the assessment has been equalized by the county board of equalization the city assessor's books shall be corrected in accordance with the changes made by the board, a levy by a city of the fourth class based on an assessment made independently and at a valuation greatly in excess of that fixed for county purposes is invalid. *Ib.*
6. **Tax Deed: Necessary Recitals: Sale by Collector Under Act of March 30, 1872.** The Act of March 30, 1872, provided for a special term of the county court in July of each year for the enforcement of tax liens against realty, but also provided that the collector might apply to a subsequent regular term if for any good cause he could not obtain judgment at the special term. *Held*, that a collector's deed reciting proceedings and judgment of sale for taxes at the October term, 1872, without any showing of cause for application to that term, is invalid. [There is, furthermore, no showing in this case, either in the deed or elsewhere that the requisite notice of the day of sale or of the intended application to the October term was given by the collector.] *Seaman v. Hellman*, 658.

TORTS, RAVISHMENT OF FEMALE. See *Ravishment of Female*.

TRUSTS AND TRUSTEES.

1. **Will: Life Estate: Remainder: Construction.** A's will read, in part: "I hereby will and bequeath . . . to my daughters Dora, Annie, Maggie, and Amanda, severally, the sum of \$800 each, to be paid to them severally except to my said daughter Amanda; the share given her I bequeath to her sole and separate use, and I hereby constitute W her trustee" to lend or invest and manage her share for her, "paying over the interest thereon . . . for her support and maintenance, and any part of the principal if he shall deem it necessary, the balance remaining after the death of my said daughter to go to her surviving children share and share alike." Amanda's trustee invested her share in realty, taking title in himself as trustee, and put her in possession. She deeded a half interest in the land to her daughter Georgia, and by will devised a half interest in the remainder to the same daughter, her other children to have what was left. *Held*, that under A's will Amanda took a life estate only, with remainder to her surviving children, and therefore neither her deed nor her will was effectual to pass title. *Freeman v. Maxwell*, 13.
2. ———: ———: ———: **Separate Estate: Land Purchased by Trustee.** The fact that the trustee of a fund given by will to a woman for her sole and separate use for life, remainder to her surviving children, when he invested the fund in realty and put her in possession took the title in himself as her trustee with no provision for the remainder to her children, does not defeat the remainder. *Ib*.
3. ———: ———: ———: ———: ———: **Trustee's Powers of Disposing of Principal.** A's will bequeathed a fund in trust for his daughter's sole and separate use, remainder to her surviving children, the trustee to pay over the interest, and any part of the principal if he should deem it necessary, for her support. The trustee invested the fund in realty and put the daughter in possession, taking the title in himself as trustee with no provision as to the remainder. *Held*, that since there is nothing in the record to indicate that it ever became necessary to use any of the principal for the *cestui's* support, it cannot be presumed that the trustee in buying the land and taking the title as he did intended to exercise his power of paying her the principal and thought thereby to vest her with the fee in the land. *Ib*.

UNJUST DISCRIMINATION. See *Railroads*.

VACANCIES ON PARTY TICKETS. See *Elections*.

VENUE.

Indictment: Stated in Margin. It is sufficient that the venue be named in the margin or caption of an indictment. *State v. Fields*, 158.

VERDICT.

1. **Excessive Punishment.** A verdict assessing defendant's punishment at seven years' imprisonment in the penitentiary for an unprovoked assault with intent to kill, where after a quarrel in the public road with the drunken prosecuting witness he bought shells, borrowed a shotgun, and shot him in the face, as a

VERDICT—Continued.

result of which he lost his eyesight, does not indicate such malice prejudice on the part of the jury as authorizes a new trial. *State v. Curtner*, 214.

2. **Punitive Damages: No Actual Damages.** Punitive damages may be recovered where a proper basis therefor is laid in the petition and proved, although the plaintiff recover only nominal actual damages. *Keller v. Summers*, 324.
3. ———: ———: **Segregated Error.** But the error of a verdict for punitive damages authorized by an instruction on a ground not pleaded, does not affect that part of it for actual damages, and the finding for punitive damages being capable of segregation from the rest of the verdict, the judgment will be affirmed, notwithstanding said erroneous instruction, if plaintiff will file a *remititur* of the punitive damages. *Ib.*

VIADUCT.

1. **City Ordinance: In Conflict with Statute: Restrospective: Public Service Commission: Suspension of Judgment.** A city ordinance requiring a railroad company to construct a viaduct or bridge over its tracks at a street crossing, at its own expense, is in conflict with the statute permitting the Public Service Commission to apportion the costs of the viaduct between the city and the railroad company; but the statute is a later enactment, and does not have a retrospective operation, and cannot be held to nullify a suit to enforce the provisions of the ordinance prosecuted to judgment before the enactment of the statute. *State ex rel. v. Railroad*, 720.
2. ———: **Suspension By Statute.** Whatever rights have been acquired by a city, and whatever has been legally done under its charter and ordinances, prior to the enactment of a statute, are beyond the power of the General Assembly to disturb by such statute. *Ib.*
3. ———: ———: **Rights Acquired By Violation of Ordinance.** If the city ordinance is valid and binding, the railroad company cannot gain any advantage by violating it. Where it appears that, if the railroad company had obeyed the ordinance requiring it to build a viaduct in a street crossed by its tracks, the viaduct would have been almost completed before the suit was brought to compel it to obey it, the courts will not listen with patience to its prayer that, as no actual work has been done on the viaduct and the later enacted statute permits the Public Service Commission to apportion the costs between the city and the company, said apportionment should be made by the courts. *Ib.*
4. **Over Street: Overhead or Under Tracks: Option.** Under the charter of the city of St. Louis the Missouri Pacific Railway Company does not possess an option to cause streets to pass over or under its tracks, and mandamus will lie to compel it to obey an ordinance requiring it to construct a viaduct over its tracks crossing a public street. In ordering the abolition of a grade crossing the city proceeds under the authority of its charter, which is an exception to the general statutes pertaining to the subject. *Ib.*
5. **Ordinance: Recital of Reasons for its Enactment: Over Street.** A legislative body need not recite the reasons which move it

VIADUCT—Continued.

- to enact a law. The law when enacted furnishes its own reasons. A railroad company cannot refuse to obey an ordinance requiring it at own expense to construct a steel viaduct over its tracks at a street crossing for that the ordinance does not declare the existing grade crossing a public nuisance, or that it is dangerous, or states no reason for requiring a separation of grades at said crossing. *Ib.*
6. **At Street Crossing: No Benefit District.** A railroad company is not justified in refusing to obey an ordinance of the city of St. Louis requiring it to construct at its own expense a steel viaduct over its tracks at a certain street crossing, because certain statutes intended to apply to cities of the first class require the establishment of a benefit district "to pay for the damages which may be caused to any property by reason of the construction of such subway or viaduct," and no such benefit district has been established; for, said city is not of the category of cities of the first class, but is organized under a special free-holders' charter authorized by the Constitution, and said statutes do not apply. *Ib.*
7. ———: **Title of Street: Admitted in Return.** The title to public streets is necessarily in the city; and if defendant in its return to the writ of mandamus, commanding it to construct a viaduct over its tracks at a certain street crossing, admits that the street was at all times a public street, it will not be heard to contend that the title to the street is in it. *Ib.*
8. ———: **Unreasonable Ordinance: Must Be Pleaded.** When a defendant wishes to avoid the provisions of an ordinance on the ground that they are unreasonable, the particular facts which render them invalid should be pleaded. A general allegation that the "ordinance is unreasonable upon its face, is unjust and oppressive, and was passed without due consideration and without affording defendant an opportunity to be heard," is not sufficient to authorize a court to hold that an ordinance requiring defendant to construct at its own expense a steel viaduct over its tracks at a street crossing is unreasonable. *Ib.*

WHARF. See **Forcible Entry and Detainer.**

WILLS.

1. **Life Estate: Remainder: Construction.** A's will read, in part: "I hereby will and bequeath . . . to my daughters Dora, Annie, Maggie, and Amanda, severally, the sum of \$800 each, to be paid to them severally except to my said daughter Amanda; the share given her I bequeath to her sole and separate use, and I hereby constitute W her trustee" to lend or invest and manage her share for her, "paying over the interest thereon . . . for her support and maintenance, and any part of the principal if he shall deem it necessary, the balance remaining after the death of my said daughter to go to her surviving children share and share alike." Amanda's trustee invested her share in realty, taking title in himself as trustee, and put her in possession. She deeded a half interest in the land to her daughter Georgia, and by will devised a half interest in the remainder to the same daughter, her other children to have what was left. *Held*, that under A's will Amanda took a life estate only, with remainder to her surviving children, and

WILLS—Continued.

therefore neither her deed nor her will was effectual to pass title. *Freeman v. Maxwell*, 13.

2. ———: ———: **Separate Estate: Land Purchased by Trustee.** The fact that the trustee of a fund given by will to a woman for her sole and separate use for life, remainder to her surviving children, when he invested the fund in realty and put her in possession took the title in himself as her trustee with no provision for the remainder to her children, does not defeat the remainder. *Ib.*
3. ———: ———: ———: ———: **Trustee's Power of Disposing of Principal.** A's will bequeathed a fund in trust for his daughter's sole and separate use, remainder to her surviving children, the trustee to pay over the interest, and any part of the principal if he should deem it necessary, for her support. The trustee invested the fund in realty and put the daughter in possession, taking the title in himself as trustee with no provision as to the remainder. *Held*, that since there is nothing in the record to indicate that it ever became necessary to use any of the principal for the *cestui's* support, it cannot be presumed that the trustee in buying the land and taking the title as he did intended to exercise his power of paying her the principal and thought thereby to vest her with the fee in the land. *Ib.*
4. **Suit To Probate: Action at Law.** An action in the circuit court to probate in solemn form a will which has been rejected by the probate court is but a will contest, and is an action at law, and the appellate court will not interfere with the verdict of the jury on the ground that the preponderance of the evidence was that there was no unsoundness of mind producing testamentary incapacity, where there was substantial evidence that testator was of unsound mind. *Heinbach v. Heinbach*, 69.
5. **Contest: Substantial Testimony: Drunkenness.** Where there is testimony that testator was an old man and for many years had been an extreme drunkard; two physicians say he died of alcoholic dementia, one of them that his condition of dementia must have extended back to a period of time before the will was made; certain statements made by testator indicate that they were either the idle vaporings of intoxication or the result of mental hallucinations, and one son is wholly unaccounted for; and, on the other hand, another physician, with opportunity to know, testifies that he was not afflicted with senile or alcoholic dementia, and nine lay witnesses positively testify that he was of sound mind, the question of his mental capacity to make a will is one for the jury; for the evidence being substantial, its very inconclusiveness requires the submission of that issue of fact to the tiers of the fact, and their finding, if the instructions were proper and there was no error in the admission or rejection of evidence, is conclusive on the appellate court. *Ib.*
6. ———: **Interest of Witness: Attorney: Contract of Employment.** The interest of any witness in the outcome of a suit may always be shown for the purpose of affecting the credibility of his testimony; but where the witness has admitted that he is an attorney in the case, and has been asked to assist in the trial by the attorney who has a contract of employment by some of contestants for a contingent interest in the property if the will is rejected, it is not prejudicial to the sole

WILLS—Continued.

proponent to reject as evidence such contract, since it in nowise bears on the issue of testator's incapacity and the interest of the witness is sufficiently shown. *Ib.*

7. ———: **Definition of Incapacity.** An instruction which omits some of the elements of incapacity, and thereby prescribes less soundness of mind than the law requires, is not an error of which proponent can complain, since the error is one in her favor. *Ib.*
8. ———: **Instructions: Comment on Evidence: Capacity to Make Contract.** An instruction which picks out certain isolated acts of business transacted by testator and ignores others done wholly or partly by him, is an erroneous comment on the evidence. And an instruction that tells the jury that "notwithstanding he was able to transact some business, signing leases, giving checks and receipts, yet unless the jury find from the evidence he possessed a mind and memory sufficiently clear and unimpaired to take into consideration all his property," etc., and ignores other business acts shown by the evidence to have been transacted by him during the time he is said to have been afflicted with senile and alcoholic dementia, such as the purchase of a house, the purchase of a piano on a contract of time-payment by installments, and the execution of divers dramshop bonds, is such an instruction. Nor is it held that a specific mention of all these business acts would have cured the unwarranted mentioning of some of them. The effect of the instruction was to tell the jury that all these business acts went for naught in the scale of sanity, unless the jury went further and found that he "possessed a mind and memory sufficiently clear and unimpaired to take into consideration all his property," etc.; and in effect told the jury that though testator may have been mentally capable of making a contract, it did not follow that he was capable of making a will; and in a close case, is reversible error. *Ib.*
9. ———: **Incapacity: Numerous Definitions.** Numerous instructions defining testamentary incapacity should not be given. Different and dissimilar definitions are misleading. *Ib.*
10. **Power of Disposition: Limitation Over.** Where a life estate is expressly or impliedly created by will or deed, with which is coupled a power of disposition by the life tenant and a remainder in fee to others, the limitation over will take full effect upon the death of the life tenant, unless the power of disposition has been exercised by her in strict accordance with the terms in which it was bestowed. So much of the property as the life tenant has not attempted to dispose of, upon her death vests in fee in the remaindermen *namd.* *Priest v. McFarland*, 229.
11. ———: **Reservation of Life Estate.** The testator devised all his property to his wife, "to be held, owned and enjoyed by her during her natural life with full power to sell and dispose of the same or any part thereof absolutely and at her own discretion and with full power to give a good and perfect title upon sale or other disposition of any or all of my said property" and further provided that "at the death of my said wife whatever of my property or its proceeds may remain undisposed of by my said wife, shall descend to and be divided between my said children." The wife conveyed the land in suit to two of said

WILLS—Continued.

children for an expressed consideration of \$6000, reserving to herself a life estate, and providing that the fee should vest in them at her death. They went into possession and accounted to her for rent until her death. *Held* by a majority of the judges, that the deed should be upheld; that the life tenant could dispose of the fee, and reserve to herself a life estate in the property; though a majority do not agree that she had power to give away the property, but there being evidence that the consideration named was actually paid a majority hold that the judgment of the trial chancellor should be affirmed. *Priest v. McFarland*, 229.

12. ———: **Testamentary Deed.** A deed which expressly reserves a life estate in the grantor, and conveys at the same time, by words of present import, a vested remainder in the property to the grantees, is not a mere attempt to convey the title by an instrument in the nature of a last will and testament, but is in legal effect a present conveyance of a fixed right, namely, a vested title in fee. *Ib.*
13. **Probate of: Not Entered of Record: Order Made After Many Years: Evidence.** The Revised Statutes of 1855 provided that the clerk of the county court should take the proof of wills in vacation, subject to confirmation or rejection by the court, and that when any will was exhibited, the clerk might receive the proof and grant a certificate of probate or of rejection. In 1865 a will was presented, and the proof of the subscribing witnesses was written, signed, and certified upon the will itself, which was then filed but not recorded. The court, when it met in term, made an order appointing an administrator *c. t. a.* This suit to quiet title having arisen long afterward, involving the provisions of the will, it was held on a former appeal that the proof did not justify the conclusion that the will had been probated. Accordingly the probate court, in 1912, ratified the proceedings of the county clerk, adjudged the instrument proved and ordered it admitted of record. The order and judgment were copied upon the will and signed by the judge. *Held*, that the instrument was thereafter, in the retrial of the suit to quiet title, properly received in evidence as the last will and testament of its signer, and that under it the plaintiffs are entitled to their interests as remaindermen. *Farris v. Burchard*, 334.

Rules for the Government of the Supreme Court of Missouri.

RULE 1.—Chief Justice, His Duty. The Chief Justice shall superintend matters of order in the court room.

RULE 2.—Motions to be Written, Signed and Filed. All motions in a cause shall be in writing, signed by counsel and filed of record.

RULE 3.—Argument of Motions. No motion shall be argued unless by the direction of the court.

RULE 4.—Diminution of Record, Suggestion After Joinder in Error. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

RULE 5.—Application for Certiorari. Whenever a *certiorari* may be applied for, there shall be an affidavit of the defect in the transcript which it is designed to supply, and at least twenty-four hours' notice shall be given to the adverse party or his attorney previous to the making of the application.

RULE 6.—Reviewing Instructions. For the purpose of reviewing the action of the trial court, in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form avoiding repetition and omitting all immaterial matter.

RULE 7.—Bill of Exceptions in Equity Cases. In cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence may be reduced to a narrative form where this can be done and at the same time preserve full force and effect of the evidence.

RULE 8.—Presumption in Support of Bill of Exceptions. The only purpose of a statement, in a bill of exceptions, that it set out all the evidence in the cause, being that the Supreme Court may have before it the same matter which was decided by the court of first instance, it shall be presumed as a matter of fact in all bills of exceptions, for the future, that they contain all the evidence applicable to any particular ruling to which exception is saved.

SUPREME COURT RULES.

RULE 9.—Making up Transcripts. The clerks of the several circuit courts and other courts of the first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (unless an exception is saved to the regularity of the process, or its execution, or to the acquiring by the court of jurisdiction in the cause), in making out transcripts of the record for the Supreme Court, set out the original or any subsequent writ or the return thereof; but in lieu thereof shall say (*e. g.*): "Summons issued October 2, 1891, executed October 5, 1891," and, if any pleading be amended, the clerk, in making out transcripts, will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleading or part of the record, unless it be made such by a bill of exceptions; and no clerk shall insert in the transcript any matter touching the organization of the court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by the bill of exceptions.

RULE 10.—Words Appellant and Respondent, What They Include. Whenever the words appellant and respondent appear in these rules they shall be taken to mean and include plaintiff and defendant in error and other parties occupying like positions in a cause.

RULE 11.—Abstracts in Lieu of Transcript, When Filed and Served. In those cases where the appellant shall, under the provisions of section 2253, Revised Statutes of 1889, file in the court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing, and shall in like time file ten copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file ten copies thereof with the clerk of this court. Objections to such complete or additional abstract shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time. (As amended February 26, 1895.)

RULE 12.—Abstracts, When Filed and Served. In all cases where a complete transcript is brought to this court in the first instance, the appellant shall deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file ten copies thereof with the clerk of this court not later than the day preceding the one on which the cause is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file ten copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

SUPREME COURT RULES.

RULE 13.—Abstracts, What They Shall Contain. The abstracts mentioned in rules 11 and 12 shall be printed in fair type, and shall be paged, and shall have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there are no questions made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made over the pleadings, or as to the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other respects the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the assigned errors.

RULE 14.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases ten printed and indexed, uncertified copies of the entire record, filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with said rule and dispense with the necessity of any further abstracts.

RULE 15.—Briefs, What to Contain and When Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last-named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and ten copies of each brief shall be filed with the clerk on or before the last-named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. And any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown the court shall otherwise direct.

In citing authorities, in support of any proposition, it shall be the duty of the counsel to give the names of the parties to any case cited from any report of the adjudged cases, as well as the number of the volume and the pages where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, section, paging or side paging shall be set forth.

SUPREME COURT RULES.

RULE 16.—Failure to Comply With Rules 11, 12, 13 and 15. If any appellant in any civil case shall fail to comply with the rules numbered 11, 12, 13 and 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error; or at the option of the respondent continue the cause at the cost of the party in default.

RULE 17.—Costs, When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstract, filed in lieu of a full transcript under section 2253, Revised Statutes 1889, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. But in those cases brought to this court by a copy of the judgment, order, or decree instead of a full transcript, and in which the appellant shall file in this court a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same.

In any case in which a manuscript record has been or may be filed in this court, a reasonable fee for printing an abstract of the record or the entire record in lieu of an abstract may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and, if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge.

RULE 18.—Service of Abstracts and Briefs. Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

RULE 19.—Service of Abstract and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of the Supreme Court a printed statement, containing apt reference to the pages of the transcript, assignments of errors and brief of points and argument, and serve a copy thereof upon the Attorney-General, and, thereupon the Attorney-General shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeal as poor persons, by the circuit court, counsel will be permitted to file typewritten briefs and statements. In cases in which the tran-

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script has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the Attorney-General his brief and statement five days before the hearing.

When such transcript has been filed in this court fifteen days before the first day of the term at which such case is set for hearing, the appellant or plaintiff in error, shall file his statement, brief and assignments of error five days before the first day of such term, and the Attorney-General shall have till on or before the first day of the term within which to file his brief and statement.

Hereafter no brief or statement shall be allowed to be filed in a criminal case out of time, as in this rule prescribed; nor will counsel who violate this rule be heard in oral argument, unless in exceptional cases, for good cause shown, by motion theretofore filed, heard and ruled on before the day set for the hearing of the case.

Ordered to be in full force and effect on and after September 1, 1913. [Adopted April 28, 1913.]

RULE 20.—Taking Record From Clerk's Office. No member of the bar shall be permitted to take a record from the clerk's office.

RULE 21.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard and the motion for rehearing overruled either in division of *in banc* no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk.

RULE 22.—Extension of Time. Hereafter in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—Notice to Adverse Party. A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his at-

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torney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall on filing such motion, satisfy the court that such notice has been given.

RULE 24.—A motion to transfer a cause under the provisions of the Constitution from either division to court *in banc* must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in Rule 23.

RULE 25.—Return of Original Writs. Original writs or other process issued by either division of the court, or by any judge in vacation, may be made returnable to and disposed of by such division, or the court *in banc* as such division or judge in vacation may order.

RULE 26.—Assignment of Motions in Civil Causes. All motions and matters in civil causes which have not been assigned by the court *in banc* to a division for final determination, upon the record, shall be presented to, heard and determined by the court *in banc*. All matters in civil causes which have been assigned to a division shall be presented to and heard and determined by such division.

RULE 27.—Assignment of Criminal Causes. All criminal causes, and matters pertaining thereto, shall be heard and determined by Division Number Two.

RULE 28.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall be taken or writs of error sued out to this court after January 1, 1902, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable, and when the appellant for any reason can not or does not file a complete transcript, he shall file within the time allowed by said section of the statutes a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term, shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899. (Adopted at October sitting, 1901.)

RULE 29.—The time allowed for oral argument and statement shall be an hour and ten minutes for appellant or plaintiff in error, or relator in original proceeding, and fifty minutes for respondent or defendant in error or respondent in original proceeding. (Adopted at the January sitting, 1912.)

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RULE 30.—All motions, briefs, letters or communications in anywise relating to a matter pending in this court must be addressed to its clerk, who will lay them before the court in due course. Hereafter any letter or communication relating directly or indirectly to any pending matter, addressed personally or officially to any judge of this court, will be filed with the case and be open to the inspection of the public and opposing parties. (Adopted at the July sitting, 1912.)

RULE 31.—All rules not included in the foregoing enumeration are hereby rescinded.

RULE 32.—Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

Anything in any rule to the contrary is hereby abrogated. (Adopted December 10, 1912.)

RULE 33.—No original remedial writ, except *habeas corpus*, will be issued by this court in any case wherein adequate relief can be afforded by an appeal or writ of error, or by application for such writ to a court having in that behalf concurrent jurisdiction. (Adopted April 2, 1914.)

RULE 34.—No oral arguments will be granted by this court on applications for original remedial writs; and before such writs shall issue, the applicant therefor shall give not less than five days notice thereof to the adverse party, or his attorney. Such notice shall be in writing, accompanied by a copy of the application for the writ, and the suggestions in support of same. The adverse party may file in this court suggestions in opposition to the issuance of the writ. Whenever the required notice would, in the judgment of the court, defeat the purpose of the writ, it may be dispensed with. On final hearing printed abstracts and briefs shall be filed in all respects as is required in appeals and writs of error in other civil cases. (Adopted April 2, 1914.)

RULE 35.—No writ of *certiorari* shall be granted to quash the judgment of a Court of Appeals, on the ground that such court has failed or refused to follow the last controlling decision of the Supreme Court, unless the applicant for such writ shall give all parties to be adversely affected, or their attorneys of record, at least five days notice of such application; and the applicant shall, in the petition

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of not exceeding five pages, concisely set out the issue presented to the Court of Appeals and show wherein and in what manner the alleged conflicting ruling arose, and shall designate the precise place in our official reports where the controlling decision will be found. Said petition shall be accompanied by a true copy of the opinion of the Court of Appeals complained of, a copy of the motion for rehearing or to transfer the cause to this court, a copy of the ruling of the Court of Appeals on said motion, and suggestions in support of the petition not to exceed six printed or typewritten pages.

The notice to the party to be adversely affected shall be printed or typewritten, accompanied by a true copy of the petition, and all exhibits and suggestions in regard thereto. The party to be adversely affected may file on or before the day preceding that fixed by the notice, suggestions of not more than five printed or typewritten pages, stating the reasons why such writ should not issue. (Adopted April 2, 1914.)

